SUPREME COURT, U. S.

FILED
MAY 12 1958
JOHN T. FEY, Clerk

No. 996

In the

United States Court of Appeals

For the Seventh Circuit

No. 12160

ANN WARNER,
Plaintiff-Appellant,

vs.

LEO LIEBERMAN and ELEANOR LIEBERMAN,
Defendants-Respondents.

Appeal from the United States District Court for the Eastern District of Wisconsin.

Honorable
K. P. Grubb,
Judge Presiding.

Brief and Appendix of Appellant

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In the

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ANN WARNER, *Plaintiff-Appellant,* vs. **LEO LIEBERMAN and ELEANOR LIEBERMAN,** *Defendants-Respondents.*	**Appeal from the United States District Court for the Eastern District of Wisconsin.** — **Honorable K. P. Grubb, Judge Presiding.**

Appellant's Brief

STATEMENT OF FACTS.

A. Statement of the Case.

This action was brought to recover damages occasioned by the alleged negligence of the defendants in the care and maintenance of the chaise longue chair which belonged to said defendants, and which chair was on their premises.

The defendants were the hosts and the plaintiff was their guest. The defendants brought a motion for summary judgment and the District Court sustained defendants' motion for summary judgment, and an order and judgment was filed, which judgment provided that the complaint of the plaintiff and the action of said plaintiff are dismissed on the merits, from which this appeal is taken. The error relied on arises out of the District Court's granting respondents' motion for summary judgment.

The appellant was a gratuitous house guest of the defendants, she being a sister of the defendant, Leo Lieberman (App. 18, 36). She arrived at the home of the defendants on July 1, 1956 from California (App. 17, 36). On July 12, 1956, appellant sustained the injury for which she brings this suit (App. 17, 36). Appellant had been seated for about a minute on the chair portion of a chaise longue chair in the yard of the defendants. The defendant, Leo Lieberman, was grilling steaks. The defendant, Eleanor Lieberman, was in the house (App. 19, 26). The chaise longue chair in question had never previously been used by the plaintiff (App. 18, 27, 37). Plaintiff had seen it but did not observe anything wrong with it (App. 21, 25, 28, 37). The back of the chair portion of the chaise longue was toward the south and the footstool portion was to the north. Plaintiff was facing west with her back toward the home of the defendants. Plaintiff sat on the chaise longue chair for a short period of time and then heard her brother, the defendant, Leo Lieberman, call for her to come and eat. The portion of the chaise longue chair where one sits is considerably lower than the average chair, and in order to get up one has to push on the edge of the longue in order to get the body up (App. 19, 25, 37). As plaintiff pushed herself off and walked around the front of the chaise longue, or to the north,

she had taken only a step or two when she fell because her right foot became entangled in the leg of the chaise longue which was loose and not fastened, and which apparently was pushed to the west and north in a counterclockwise manner as she got off the chaise longue (App. 28). As plaintiff sat on the chaise longue, she could not notice that the leg was loose (App. 20, 28, 37). The loose leg of the chaise longue chair swiveled in a clockwise direction and pulled away from the seat as she was walking around to the front, and caught plaintiff's right leg, tripping her (App. 29). At the time plaintiff was seated on the chaise longue its leg was in a normal position (App. 20). In appellant's affidavit, appellant sets forth there was no opportunity to see the defective leg which had swiveled from the front of the chair before she tripped (App. 20, 28).

The affidavit of Aaron Starobin states that he examined the chaise longue on August 20, 1957 at the residence of an agent of the insurance company for defendant; that there were a total of three screws missing from the stool portion of it; that originally the front legs were attached by four screws, two on each side, and that at the time of his examination thirteen months after the injury, only one screw remained which was on the righthand side; that when one sat on the stool, and in getting up the leg underneath the footstool portion could be seen to swing out from the chair portion in a clockwise fashion (App. 35, 37).

The testimony of the defendant, Leo Lieberman, in his deposition, sets forth that during the winter prior to the accident, the chaise longue had been stored in the basement; that prior to storing it in the basement he had noticed the defective front legs with the bolts missing; that when he took it out in May or early June, the front portion of the

front leg was not fastened to the footstool portion of the chaise longue (App. 9); that the support should have been fastened to the footstool portion on the left side and the right side (App. 9). That the left front side was not fastened, and that a screw and bolt were missing (App. 9). That when said chaise longue chair had been stored the previous fall it was in bad shape (App. 9); that the defendant, Leo Lieberman, noticed that it needed fixing but that he had not fixed it (App. 9). That when he took it out in the spring, he again noticed that it was not working and that it required repair (App. 10). That if the defendant, Leo Lieberman, put the support underneath the frame, it would stay there and hold, but that it would not hold solidly (App. 10). That if the footstool portion was pushed slightly, the support leg would come loose (App. 10). That the defendant, Leo Lieberman, knew that a person could fall on the leg that was loose and that it would move when a person was either about to sit on it or was in the process of getting up from it (App. 13). That the defendant, Leo Lieberman, knew that the chaise longue chair, in the condition it was in at the time the plaintiff was injured, was dangerous (App. 16). That the defendant never told plaintiff that the chaise longue was defective, and that although defendant knew someone could fall, he did not believe anyone would be badly hurt.

The affidavit of Eleanor Lieberman set forth that she knew there were several screws missing from the chaise longue in the summer of 1956 and prior to the accident. That she and the child of the defendants used the chaise longue during that time with the screws missing, and to the best of her knowledge no one had ever been injured because of the condition of the chaise longue before plain-

tiff's accident (App. 26). That she did not see the legs of the chaise longue protruding beyond the front or side of the chaise longue before the accident, although she did see the legs of the chaise longue protrude after the accident when the plaintiff was entangled in the chaise longue (App. 26). That prior to the accident, the defendant, Eleanor Lieberman, had used the chair carefully, being aware of its condition, and that she had never told the plaintiff of its damaged condition (App. 26-27).

SUMMARY OF ARGUMENT.

I. The District Court, in granting respondents' motion for summary judgment, placed great stress upon the following Wisconsin cases: *Greenfield* v. *Miller,* 173 Wis. 184; 180 N.W. 834; *Cleary* v. *Eckart,* 191 Wis. 114; 210 N.W. 267; *O'Shea* v. *Lavoy,* 175 Wis. 456; 185 N.W. 525; *Lewko* v. *Krause Milling Co.,* 179 Wis. 83; 190 N.W. 924.

The District Court in its opinion set forth certain ultimate facts most favorable to the plaintiff which could be found by a jury: (a) A chaise longue with three missing screws or bolts on the part that the occupant uses as a foot rest, so that on occasion, and given the right impetus, that part would swing out. (b) This condition existed for two summer seasons. (c) There had been no previous injury or untoward incident in the use of this chaise longue. (d) Defendants were aware of this condition and, notwithstanding that condition, used the chaise longue. (e) Plaintiff was not aware of that condition. (f) Defendants did not inform plaintiff of that condition. (g) Plaintiff was a gratuitous guest of defendants. However, an ultimate fact not set forth by the District Court is that the defendants knew that if the leg of the chair would pull out while someone was about to either sit on the chair or get up therefrom, somebody could fall and that the condition of said chair was dangerous.

The law in Wisconsin applied to these facts clearly demonstrates liability on the part of the defendants; as the cases relied on by the District Court, it is contended, show a contrary view to that as set forth by said District Court; as in all the cases, an element was missing which was found in the present case; and the cases indicate if such element were present, a different decision would be arrived at.

The established rule of liability existing between licensor and licensee is that the guest accepts the premises of the host as he finds them, subject only to the limitation that the licensor must not set a trap or be guilty of active negligence which contributed to the injury.

A trap is a hidden danger lurking upon the premises which may be avoided if known. Hence, it is the duty of the host to advise a guest of its presence, so that the guest may enjoy the premises in a security equal to that enjoyed by the host.

The meaning of the word "active negligence" means more than a positive act of negligence, but, it can also mean a failure of duty to act when one has knowledge of a situation involving risk to another.

Under somewhat similar fact situations in recent cases recovery was allowed.

Although the District Court attempted to distinguish these cases from the case at bar, there is no distinction.

The failure to act where there is knowledge of the defect by the host comes within the definition of "active negligence."

Traps are also defined in recent cases as, "known but concealed hazards to a person unfamiliar with the premises."

The District Court was in error in distinguishing the fact situation in the case at bar from the holding that a defective rail known to the host and unknown to the guest was a trap merely because one was nine feet above the ground and in the case at bar the defect was close to the ground.

The law in Wisconsin is that facts testified to in an adverse examination may be undisputed, but they are not undisputable; and that summary judgment procedure is not to be substituted for a trial.

Federal Courts have held that the case for summary judgment must be made out clearly and beyond the peradventure of a doubt; and where there is any doubt as to an issue of fact, summary judgment should not be granted.

Under the numerous cases cited in Wisconsin and other jurisdictions, it is obvious that the chaise longue with the defective leg was a "trap"; and the defendants were guilty of active negligence.

The ultimate facts clearly demonstrate liability on the part of the defendants as a matter of law.

A previous injury is not necessary in order for one to be guilty of negligence or for a condition to be interpreted as dangerous.

Plaintiff's alleged contributory negligence is a jury question and can not be determined as a matter of law, this question having been raised by respondents in the Lower Court but not mentioned in the Court's opinion. A momentary diversion does not as a matter of law constitute contributory negligence.

Another question raised by respondent in the District Court but not answered by the Court was as to whether or not there was any proof as to what caused the plaintiff to fall; but her testimony clearly indicated that she fell as a result of tripping on the defective foot or leg of the chaise longue which could not be noticed previously in view of the fact that the leg swiveled as she was getting up from the chair.

The undisputed facts of all affidavits and testimony brought forth on the deposition definitely indicate that defendants were guilty of active negligence and that they created a trap, resulting in liability on their part.

The order for judgment of the District Court should be reversed.

THE CONTESTED ISSUES.

Was an issue of fact created by the pleadings, depositions and affidavits in this case so that defendants' motion for summary judgment should be denied?

Answered by the District Court "No".

PROPOSITIONS OF LAW RELIED ON.

I.

The established rule of liability existing between licensor and licensee is that the guest accepts the premises of the host as he finds them, subject only to the limitation that the licensor must not set a trap or be guilty of active negligence which contributed to the injury.

Greenfield v. Miller, 173 Wis. 184; 180 N.W. 834, 835-837.

Cleary v. Eckart, 191 Wis. 114, 119; 210 N.W. 267, 269.

Brinilson v. Chicago & N. W. R. Co., 144 Wis. 614; 129 N.W. 664, 665-667.

O'Shea v. *Lavoy*, 175 Wis. 456; 185 N.W. 525, 528.

Lewko v. *Krause Milling Co.*, 179 Wis. 83, 86; 190 N.W. 924, 925.

II.

A "trap" is a hidden danger lurking upon the premises which may be avoided if known. Hence, it is the duty of the host to advise his guest of its presence, so that the guest may enjoy the premises in the security equal to that enjoyed by the host.

O'Shea v. *Lavoy*, 175 Wis. 456; 185 N.W. 525, 528.

III.

"Active negligence" means more than a positive act of negligence, but, it can also mean a failure of duty to act when one has knowledge of a situation involving risk to another.

Ward v. *Avery*, 113 Conn. 394; 155 Atl. 502, 503.

Brinilson v. *Chicago & N. W. R. Co.*, 114 Wis. 614; 129 N.W. 664, 665-667.

IV.

A possessor of land is subject to liability for bodily harm caused to a gratuitous licensee by a natural or artificial condition thereon, if, but only if, he (a) knows of the condition or realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and (b) invites or permits them to enter or remain upon the land, without exercising reasonable care (1) to make the condition reasonably safe, or (2) to warn them of the condition and the risk involved therein.

Laube v. Stevenson et al., 137 Conn. 469; 78 A. 2d 693, 696.

Malmquist v. Leeds, 245 Minn. 130; 71 N.W. 2d 865, 868, 869.

Mistretta v. Alessi, 45 N.J. Super. 176; 131 A. 2d 891, 892, 893, (N.J. App. 1957).

Restatement, 2 Torts, Sec. 342.

Rushton v. *Winters*, 331 Pa. 78; 200 A. 60, 61.

Bigelow, Torts (8th Ed.) 160, 161.

V.

A "trap" means a danger which a person who does not know the premises could not avoid by reasonable care and skill; a hidden danger lurking on the premises which may be avoided if known, and when it is used in this sense, no intent to injure is necessarily implied by the word.

Euclid-105th St. Properties Co. v. *Beckman*, 36 Ohio L. Abs. 164; 42 N.E. 2d 789, 791, 792.

Zetley v. *Jame Realty Co.*, 185 Wis. 205; 201 N.W. 252, 254.

Corpus Juris Secundum, Vol. 87, page 905.

Honan v. *Kenney*, 205 Minn. 485; 286 N.W. 404, 405.

VI.

Relative to motions for summary judgment, the facts testified to in an adverse examination may be undisputed, but they are not undisputable; and, summary judgment procedure is not a substitute for a trial.

Beskidniak v. *Masny,* 265 Wis. 74; 60 N.W. 2d 723, 724, 725.

Parish v. *Awschu Properties, Inc.* 247 Wis. 166, 174; 19 N.W. (2d) 276, 279, 280.

Henry v. *LaGrou,* 200 Wis. 110, 115; 227 N.W. 246.

VII.

Where the affidavits set out a state of facts from which it may be possible to frame a valid complaint, the motion for summary judgment should not be granted.

Kane v. *Chrysler Corp.* (D. Del. 1948) 80 F. Supp. 360, 366.

VIII.

The case for summary judgment must be made out clear and beyond the peradventure of a doubt.

Paul E. Hawkinson Co. v. *Dennis,* (CCA 5th, 1948) 166 F. 2d 61, 63.

IX.

Momentary diversion of the attention of a person walking, does not, as a matter of law, constitute contributory negligence.

Duncan v. *Grand Rapids,* 121 Wis. 626; 99 N.W. 317, 319.

West v. *The City of Eau Claire,* 89 Wis. 31; 61 N.W. 313, 315.

ARGUMENT.

I.

Are the respondents entitled to a judgment as a matter of law on the basis of the depositions of the appellant, Ann Warner, and the respondent, Leo Lieberman, the affidavit of the respondent, Eleanor Lieberman, the affidavit of the appellant, Ann Warner, the affidavit of Aaron Starobin, and the affidavit of N. Paley Phillips.

The District Court in answering this question in favor of respondents, and granting their motion for summary judgment, seemed to place great stress upon the following Wisconsin cases: *Greenfield* v. *Miller*, 173 Wis. 184; 180 N.W. 834, 835-837; *Cleary* v. *Eckart*, 191 Wis. 114, 119; 210 N.W. 267, 269; *O'Shea* v. *Lavoy*, 175 Wis. 456; 185 N.W. 525, 528; *Lewko* v. *Krause Milling Co.*, 179 Wis. 83, 86; 190 N.W. 924, 925. The District Court, in its opinion, further set forth certain ultimate facts most favorable to the plaintiff which could be found by a jury.

(a) A chaise longue with three missing screws or bolts on the part that the occupant uses as a foot rest so that on occasion and given the right impetus, that part would swing out.

(b) This condition existed for two summer seasons.

(c) There had been no previous injury or untoward incident in the use of this chaise longue.

(d) Defendants were aware of this condition and, notwithstanding that condition, used the chaise longue.

(e) Plaintiff was not aware of that condition.

(f) Defendants did not inform plaintiff of that condition.

(g) Plaintiff was a gratuitous guest of defendants. An ultimate fact, not set forth by the District Court, which appellant believes is of importance, is that the defendant, Leo Lieberman, knew that if the leg of the chaise longue chair would pull out while somebody would be either about to sit on the chair or getting up from the chair somebody could fall (App. 16); and that defendant knew it was dangerous in that condition (App. 16).

It is plaintiff's contention that the law in Wisconsin, applied to the ultimate facts most favorable to the plaintiff which could be found by a jury, clearly demonstrates liability on the part of the defendants.

The District Court, in its decision in allowing the motion for summary judgment, relied on certain Wisconsin cases which appellant contends show a contrary view to that as set forth by said District Court; as in all the cases an element was missing which is found in the present case, and in all cases the Reviewing Court implied if such element were present a different decision would be arrived at. Accordingly, we are discussing the cases cited by the District Court in arriving at its decision.

In the case of *O'Shea* v. *Lavoy*, 175 Wis. 456, at pp. 462, 463, 185 N.W. 525, 528, relied on by the District Court, the defendant was the owner of an automobile which turned over causing injuries to plaintiff because of a defective spring. Prior to the trip, the defendant had certain leaves of the spring repaired; and, after the collision, it was determined that it was not the repaired part that gave way, but the master leaf of the spring, which up to that time had fully performed its service.

The Wisconsin Supreme Court, in discussing the fact situation, stated that it could see no difference between an invitation extended by a person to dine with him and an

invitation extended to ride with him. Further discussing the legal relationship between the two situations, the Court stated that in the former case the legal relationship arising was that of licensor and licensee. It follows that the same relationship arises in the latter case, which conclusion is supported by authorities already cited. The Court further stated that whether or not the established rules of liability existing between licensor and licensee are applicable in the matter of the management of the automobile, they plainly are applicable so far as the condition of the automobile is concerned. According to those rules, the guest accepts the premises of his host as he finds them, subject only to the limitation that the licensor must not set a trap or be guilty of active negligence which contributed to the injury.

The Court, in discussing a trap, stated that a trap, within the meaning of this rule as we understand it, is a hidden danger lurking upon the premises which may be avoided if known. *Hence, it is the duty of the host to advise his guest of its presence, so that the guest may enjoy the premises in a security equal to that enjoyed by the host.* (Emphasis ours.)

The facts in the *O'Shea* case can be distinguished from the case at bar in view of the fact that in the *O'Shea* case defendant was not aware of the defective main spring. In the case at bar, defendants were aware of the fact that the leg of the chaise longue was defective, and, notwithstanding that condition, allowed the chaise longue to be used by the plaintiff, although plaintiff was not aware of its defective condition and the defendant did not inform plaintiff thereof although knowing of the defect, and knowing that the leg could pull out causing the person to fall, and that the condition of said chair was dangerous;

and that the chair with the leg pulled out was as set forth in the photographs attached hereto (App. 10, 16).

In *Cleary* v. *Eckart,* 191 Wis. 114, 119; 210 N.W. 267, 269, relied on by the District Court, where a gratuitous occupant of an automobile was injured in a situation arising from a deflated tire on a gravel road, and, the inexperienced host, in attempting to stop her automobile suddenly, caused injuries to the plaintiff-guest when the car skidded. The plaintiff-guest knew of defendant's limited experience in driving automobiles.

The Wisconsin Supreme Court, in discussing the situation stated that the situation here is analogous where one invited another to ride in a horse drawn vehicle. Comparing such a situation, it was said that, "One who invites another to ride is not bound to furnish a sound vehicle or a safe horse. If he should have knowledge that the vehicle was unfit for transportation or the horse unsafe to drive, another element would arise, and he might be liable for recklessly inducing another to enter upon danger." *Patnode* v. *Foote,* 153 App. Div. 494, 138 N.Y. Sup. 221, 222, 223.

The *Cleary* case refers to *Greenfield* v. *Miller,* 173 Wis. 184; 180 N.W. 834, 835-837, one of the leading cases in Wisconsin relative to guest-host relationship, which case will be discussed hereafter.

Appellant strongly contends, in the *Cleary* case, that if the plaintiff was not aware of the limited driving experience of the defendant, defendant would have been found liable, which is a different situation than in the present case where the plaintiff was not aware of the defect.

In *Greenfield* v. *Miller,* 173 Wis. 184; 180 N.W. 834, 835-837, cited by the District Court as the leading Wisconsin case, the defendant invited the plaintiff to spend New

Year's Eve at the home of the defendant which had recently been finished, the floors highly polished, and had oriental rugs thereon. While walking through the house, the plaintiff slipped on a small oriental rug and injured her leg.

The Wisconsin Supreme Court stated that there was no liability on the part of the licensor for injuries sustained by those coming on his premises as mere licensees, unless there is something on the premises in the nature of a trap which fact proximately caused the injuries, or the licensor was guilty of active negligence.

Reference was made to Bigelow, Torts (8th Ed.) 160, 161, where it is stated:

> If a licensee is invited only as a guest or friendly visitor, or for benevolence, he enters on no better footing as far as the present question is concerned, than if he were a bare licensee; he can not hold the owner or occupant to any duty of care or diligence beyond giving notice of any danger of which he is aware.

The lower court in directing a verdict in favor of the defendant stated:

> I can see that if it appeared from the evidence that it was usual and customary in the vicinity of the home of the defendant to have rugs of that kind fastened to the floor, and that the defendant had knowledge of that custom or usage, or ought to have knowledge of it, and the plaintiff either did not know anything about the conditions there at the time or assumed that this rug was fastened so as to be reasonably safe, the situation might be entirely different; but that is not this case.

However, the Supreme Court of Wisconsin, in the opinion, stated that it was not necessary to decide as to the proposition that if it were established that it was the custom to have oriental rugs fastened, and defendant knew this and failed to notify plaintiff, and plaintiff was ignorant of this fact, if there could be a recovery, as there was not

sufficient evidence of the custom in the trial below. However, the Lower Court did state in its opinion that if this were the custom the situation might be entirely different.

From the language in the *Greenfield* case, appellant strongly contends that if there was evidence in that case as to the general custom, and that the plaintiff had assumed that the rug was fastened and was not advised to the contrary, that the decision would have been in favor of the plaintiff. And applying the reasoning of the court in said *Greenfield* case to the present case, it can readily be seen where an entirely different situation arises due to the fact that the defendant knew of the dangerous and defective condition of the chaise longue, knew that someone could be hurt, plaintiff did not have knowledge or was advised of the defective condition, so that a trap was established by the defendant and the defendant was guilty of active negligence in placing such a chaise longue where it would be used by invitees and not informing the plaintiff of its defective condition.

In a case submitted but not relied on by the District Judge, *Brinilson* v. *Chicago & N. W. R. Co.*, 144 Wis. 614; 129 N.W. 664, 665-667, the plaintiff, a small boy, fell into a steam and hot water pit constructed by the defendant in a breakwater. The Court, in commenting, stated that the opening or hole in the cover of the steam pit, as described in the evidence, was dangerous, seemed self-evident from its very nature and condition. It is also clear that the hole in the planking that covered the excavation was not readily observed, and was obstructed by the steam arising therefrom through this hole and the cracks between the planks covering the pit. This condition of the planks made the pit a dangerous trap or pitfall to persons on the premises, and the omission to observe and repair the planking constitutes active negligence on the part of the railroad toward them.

The *Brindlson* case can be distinguished from *Lewko* v. *Krause Milling Co.*, 179 Wis. 83, 86; 190 N.W. 924, 925, which was cited and relied on by the District Court; as in the *Lewko* case the Court held that the pit in question was open and obvious and could not be classified as a "hidden trap" or a "concealed death dealing instrumentality". In the present case the legs of the chaise longue being put into an apparent normal condition, though being not properly fastened, was a definite hidden trap as well as active negligence as stated previously.

In resume, counsel for appellant strongly contends that the law in Wisconsin relative to guest-host relationship, provides that the guest accepts the premises as he finds them, subject only to the limitations that the licensor must not set a trap or be guilty of active negligence which contributed to the injury. Although counsel for appellant has found some cases touching upon the meaning of the word "trap" in Wisconsin, no Wisconsin case has come to his attention defining the meaning of the word "active negligence".

In Vol. 63, Corpus Juris, p. 803, a trap is defined as a concealed defect or hidden dangers lurking upon the premises which may be avoided if known.

In Vol. 65, C. J. S., p. 322, active and passive negligence are defined as distinguishable from each other. The term, "active negligence", as properly used, denotes some positive act or some failure in a duty of operation which is the equivalent of a positive act, and "passive negligence" the failure to do something that should have been done.

Attention is directed to *Laube* v. *Stevenson, et al.*, 137 Conn. 469, 78 A. 2d 693, 696, (Jan. 30, 1951) where the rule determinative of the land owner's liability to a gratuitous licensee is discussed. Reference is made in this case to Restatement 2 Torts, Sec. 342, where it is stated:

> A possessor of land is subject to liability for bodily harm caused to a gratuitous licensee by a natural or artificial condition thereon, if, but only if, he (a) knows of the condition or realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and (b) invites or permits them to enter or remain upon the land, without exercising reasonable care (1) to make the condition reasonably safe, or (2) to warn them of the condition and the risk involved therein.

The *Laube* case refers to *Ward* v. *Avery,* 113 Conn. 394; 155 Atl. 502, 503, which sets forth as follows:

> Though the plaintiff was a mere licensee as claimed by the defendant, the duty devolved upon him, when her presence in the store became known, to use ordinary care to avoid injuring her by a positive act of negligence, or a failure of duty which was the equivalent of such act.

From the above, it would appear that the meaning of the word "active negligence" means more than a positive act of negligence, but, it can also mean a failure of duty to act when one has knowledge of a situation involving risk to another.

This is the same situation in the present case as it was active negligence on the part of the defendants in placing the defective chair in the yard where it could be used by licensees or guests such as this plaintiff, and, knowing of this defective condition, failing to advise a guest or this plaintiff who was unaware of the defective condition.

This ruling has been followed in practically all jurisdictions and we are citing a few cases as close to point as possible. The general rule is set forth in the case of *Rushton* v. *Winters,* 331 Pa. 78; 200 A. 60, 61 (1938) where it was held that owners of private dwellings are not ordinarily liable to a social guest injured on a porch or steps leading therefrom in the absence of a trap or wilful or

wanton misconduct or failure to warn of known but latent dangers. The *Rushton* case indicates that under the fact situation in the present case there is liability.

In the case of *Mistretta* v. *Alessi,* 45 N.J. Super. 176; 131 A. 2d 891, 892, 893 (N.J. App. 1957) where a home owner failed to sand an icy porch, judgment was for the plaintiff. The plaintiff was a social guest injured in a fall thereon. The Court stated that the occupier owes a social guest an affirmative duty of care.

An important case in point and under a somewhat similar fact situation permitted recovery for the guest. *Malmquist* v. *Leeds,* 245 Minn. 130; 71 N.W. 2d 865, and particularly at p. 868. This case was decided in 1955 in Minnesota. In this case, the plaintiff was a social guest at the home of the defendant. She fell into an open stairwell in defendant's home which was in the process of being remodeled. Previously, this had been a rear entrance and the defendant had failed to warn the plaintiff of the change, although she walked past the area with the plaintiff. It was held in view of the fact that defendant knew of the dangerous condition of the open stairway; and in view of the fact that the defendant had reason to believe that this danger might not be discovered by the plaintiff; that nevertheless, although a licensee takes the premises as he finds them. the landlord or host has the duty of not exposing the guest to sudden danger.

The District Court, in distinguishing the *Malmquist* v. *Leeds* case, stated that in the *Malmquist* case the defendants "realized the danger involved." In the present case the defendant, Leo Lieberman, testified similarly that he knew it was dangerous and that one could fall.

In summary, appellant contends that where the host has knowledge of a hidden defect, it is incumbent upon the

host to warn his guest of the risk, or, upon failure so to do, the host is liable. This failure to act, where there is knowledge of a defect, by the host, comes within the definition of active negligence.

Relative to the meaning of the word "trap", counsel for the appellant respectfully contends that it means a danger which a person who does not know the premises could not avoid by reasonable care and skill; a hidden danger lurking upon the premises which may be avoided if known, and when it is used in this sense, no intent to injure is necessarily implied by the word. Corpus Juris Secundum Vol. 87, p. 905. Traps and pitfalls may be defined, under more recent cases, as, "known but concealed hazards to a person unfamiliar with the premises, such as an unfilled cesspool, *Honan* v. *Kenney,* 205 Minn. 485; 286 N.W. 404, 405; an excavation in the right-of-way continuously used by the public, *Morrison* v. *Carpenter,* 179 Mich. 207; 146 N.W. 106; a skylight having the appearance of a roof, *Euclid-105th St. Properties Co.* v. *Beckman,* 36 Ohio L. Abs. 164; 42 N.E. 2d 789, 791, 792; and a defective porch rail, *Rushton* v. *Winters,* 331 Pa. 78; 200 A. 60, 61 (1938). In the *Rushton* case particularly there was an unsafe railing known to the host but unknown to the guest. The guest was not advised of the same. The guest leaned on the railing which was assumed to be safe. The same gave way and the guest was injured. The Court permitted a recovery for the guest, holding to the effect that the knowledge of a defective porch rail which one would ordinarily assume to be safe constituted a trap and active negligence. The District Court in its opinion attempted to distinguish the *Rushton* case from the present case by setting forth that the unsafe railing was nine feet above a concrete driveway and that it should have been apparent that an unreasonable risk of harm was involved. The District Court apparently meant "apparent to the defendant". However, in the case at bar, the de-

fendant testified that the chaise longue in its defective condition was dangerous, and that one could fall; and therefore appellant contends it would be a trap similar to that in the *Rushton* case. Whether or not a situation is dangerous, is not determined by defendant's knowledge as to the condition, but the nature of the condition itself. Although, in the present case the chaise chair was dangerous and defendant knew it. Whether or not the unsafe condition was such that a person could fall nine feet or nine inches is immaterial as to whether or not it was a trap or a dangerous condition, as a nine-foot fall might cause slight injuries and a nine-inch fall, under certain circumstances, might cause serious injuries or death. The owner or a person in control is liable to the invitee for an injury caused by a trap or pitfall, *Franklin* v. *Maine Amusement Co.*, 133 Me. 303, 175 A. 305, 306; unless the danger is obvious or plaintiff has knowledge of the hazard, *J. C. Penney Co.* v. *Mayes*, 255 S.W. 2d 639, 643 (Ky. 1952); *A. C. Burton Co.* v. *Stasny*, 223 S.W. 2d 310, 311, 312.

In *Zetley* v. *Jame Realty Co.*, 185 Wis. 205; 201 N.W. 252, 254, where the defendant was the owner of a lot from which a building had been removed, leaving an eight foot basement excavation, he was held negligent in not maintaining in a safe condition a barrier extending along the basement hole. The evidence disclosed that the barrier consisted of a 1 x 7 inch board nailed to the building by a small nail which had become rusted, and that the board was so rotted that it slipped over the nail and fell down when plaintiff rested her hands upon it.

The Court stated that even as to licensees, the owner of premises may not make a trap or snare on his premises and so induce the public to use the same, without any responsibility on his part.

In *Rollestone* v. *Cassirer,* 3 Ga. A. 161, 59 S.E. 442, it is stated that heavy articles which are apparently in stable equilibrium or which appear to be securely fastened, but which in fact are in an unstable equilibrium and not fastened, may fairly be placed in the same category with pitfalls and traps.

Relative to motions for summary judgment, an interesting case is *Beskidniak* v. *Masny,* 265 Wis. 74; 60 N.W. 2d 723, 724, 725, where the Court stated that the facts testified to in the adverse examination may be undisputed but they are not undisputable, and said court has often said that the summary judgment procedure is not to be substituted for a trial. As stated in *Parish* v. *Awschu Properties, Inc.,* 247 Wis. 166, 174, 19 N.W. (2d) 276, 279, 280:

> Statements on an adverse examination before trial are not conclusive, and when inconsistent or in conflict with subsequent testimony under oath on a trial it is within the province of the jury to decide which story is correct. (*Sparling* v. *United States Sugar Co.,* 136 Wis. 509, 513 (at p. 513); 117 N.W. 1055; *Halamka* v. *Schneider,* 197 Wis. 538, 540 (at p. 540); 222 N.W. 821; *Henry* v. *LaGrou,* 200 Wis. 110, 115, 227 N.W. 246; and that is likewise applicable to statements in affidavits when they are inconsistent or in conflict with testimony given under oath on the trial by an affidavit or other witnesses. The summary judgment is drastic and is to be availed of only when it is apparent that there is no substantial issue to be tried. It is not a substitute for a regular trial nor does it authorize trial of controlling issues on affidavits. If there is any substantial issue of fact, which entitled plaintiffs to a determination thereof by a jury or the court, the motion for summary judgment must be denied. *Atlas Investment Co.* v. *Christ,* 240 Wis. 114, 2 N.W. (2d) 714; *Holzschuh* v. *Webster,* 246 Wis. 423, 17 N.W. (2d) 553.

In the case of *Kane* v. *Chrysler Corp.* (D. Del. 1948) 80 F. Supp. 360, 366 (In opposing defendant's motion for summary judgment, the plaintiff set out facts in affidavits going beyond the complaint. Quoting Treatise to the effect that these should be considered, Judge Rodney stated:

> Because the affidavits set out a state of facts from which it may be possible to frame a valid complaint, the motion for summary judgment should not be granted. Sec. 56, 10, *supra.*

In the case of *Paul E. Hawkinson Co.* v. *Dennis,* (CCA 5th, 1948) 166 F. 2d 61, 63:

> (the case for summary judgment must be made out clearly and beyond the peradventure of a doubt; see at nn 56, 57, par. 56.17(44), *infra*); *Cronin* v. *Petterson Lighterage & Towing Corp.* (SD NY 1950) 96 F. Supp. 608, 15 FR Serv 56c41, Case 4 ("Where there is any doubt as to an issue of fact . . . summary judgment should not be granted.")

Accordingly, interpreting the various cases to their full meaning, and in not taking portions of an opinion out of context, it can be established that the law of Wisconsin is such that under the facts in this case there was a trap and the defendant was guilty of active negligence as set forth herein; and that the Court should not have granted defendants' motions. As a matter of fact, it is respectfully contended that although the plaintiff never formally requested a motion for summary judgment in her favor but raised that point in the brief to the District Court, that this Court can and should grant summary judgment to the plaintiff relative to defendants' negligence.

In view of the numerous cases cited, and in view of the decision of the Wisconsin Supreme Court and decisions in other jurisdictions, it is obvious that this chaise longue with the defective legs was a "trap"; and that the defendants were guilty of active negligence as set forth herein in placing this defective chaise longue out onto their lawn

where it would be used by invitees, and knowing of the defective condition of the chair, failing to advise plaintiff of its condition, and further in actively putting the legs of the chair under the longue so it would give an appearance of a normal chaise longue.

The fact that the defendants had used the chaise longue knowing of the defective condition and had not fallen, or that no one else had fallen, is absolutely immaterial. There is no law that before a condition can be considered dangerous a previous injury is necessary, or that one in order to be guilty of negligence must have injured someone by the same negligent conduct previously.

II.

Was the plaintiff's negligence equal to any negligence on the part of the defendants as a matter of law.

Although this question was raised by counsel for the respondents in the Lower Court, the Court did not consider it in granting respondents' motion for summary judgment. However, anticipating that this same question may be raised again on appeal, counsel for appellant deems it necessary to give this subject consideration.

Defendants contend that when plaintiff, in her deposition stated that she was daydreaming at the time and that her eyes were not directed down, that that is sufficient to establish that her negligence is equal to any negligence on the part of the defendants as a matter of law. It should be remembered that when plaintiff sat down in the chaise longue chair, the said chair appeared outwardly to be normal. When plaintiff got up from said chair, her actions in getting up from said chair, unbeknown to plaintiff,

caused the leg of said chair to swivel out, as the result of screws being missing. When plaintiff turned, in getting up from the chair, she looked at the house from whence her brother, the defendant, Leo Lieberman, called the plaintiff. All of this happened in approximately one or two seconds, and, it is natural for a party to look ahead, rather than down at their feet when they get up. The deposition of the plaintiff indicates that she was looking.

In *Duncan* v. *Grand Rapids*, 121 Wis. 626, 99 N.W. 317, 319, it is stated that the evidence is simply that plaintiff had no previous knowledge of the existence of this defect, or of the condition of the walk; that she passed over it in broad daylight, engaged in conversation with her daughter, carrying a parasol; that she gave no particular attention to the surface of the walk, although she observed that it was a plank walk and that in places it was not solid—"was kind of teetery", as she expressed it. The Court stated there is no case in this court which justifies the holding, as a matter of law, that it is negligent to pass over a sidewalk upon a main street in the city without carefully observing the condition thereof at each point where the traveler steps, unless she has knowledge of the defect to render it perilous. *Wheeler* v. *Westport*, 30 Wis. 392, *Barstow* v. *Berlin*, 34 Wis. 357. We are not prepared to say, as a matter of law, that attention to conversation with a companion and failure to carefully observe every foot of the walk is so variant from the conduct of the ordinary person that it must be held negligence *per se*.

In the case of *West* v. *The City of Eau Claire*, 89 Wis. 31; 61 N.W. 313, 315, it was stated that momentary diversion of the attention of a person walking on the sidewalk does not, as a matter of law, constitute contributory negligence.

In any event, the question of plaintiff's alleged contributory negligence is a jury question to be answered by the jury and if for some reason should be answered in the affirmative, her negligence should be compared with the negligence of the defendants.

III.

Is there any proof that the alleged defect in the chaise longue caused plaintiff to fall, and, are the defendants entitled to judgment as a matter of law.

Although this question was raised by counsel for the respondents in the Lower Court, the Court did not consider it in granting respondents' motion for summary judgment. However, anticipating that this same question may be raised again on appeal, counsel for appellant deems it necessary to give this subject consideration.

As to whether or not there is any proof as to what caused plaintiff to fall, the Court's attention is directed to plaintiff's deposition (App. 24, 25), examination by Mr. Phillips:

> Q. Did you see as soon as—shortly thereafter, after you fell, what caused you to fall?
> A. Yes.
> Q. And can you tell us what it was that you saw afterwards that caused you to fall?
> A. The foot of the longue was out.

Plaintiff, in previous questions, implied that she did not know what caused her fall prior to the time she fell. But after the fall, as is set forth in the affidavit of the plaintiff, and the examination by Mr. Phillips, plaintiff was aware of the fact that the cause of her fall was the extended leg of the chaise longue.

In conclusion, it is respectfully submitted that on the basis of the depositions of the plaintiff and her affidavit, there can be no doubt that the leg of the chaise longue chair which had swiveled out as plaintiff was getting up from said chair was the cause of plaintiff's fall.

IV.

Are there any disputed facts to permit the granting of defendants' motion for summary judgment.

The facts as set forth in the affidavit of the plaintiff, the affidavit of Aaron Starobin, and the affidavit of the defendant, Eleanor Lieberman, and the depositions of the plaintiff and the defendant, Leo Lieberman, leave no doubt that the defendants were guilty of active negligence, that they created a trap, either one of these elements sufficient to create liability on the defendants' part, that the defendant, Leo Lieberman, knew of the defective condition of the chaise longue chair, that he had difficulty with this chair when he put it out on the lawn the previous spring, that this chair was set on the lawn in a normal position, so that anyone else, not knowing of the condition of said chair, would be entrapped. The facts further disclose that the plaintiff, Ann Warner, was unaware of the condition of this chair and it is clear from the affidavit of Ann Warner and the examination of Ann Warner by Mr. Phillips in her deposition (App. 24, 25) that the plaintiff, Ann Warner, after she fell, was aware of the cause of her fall.

Applying the case law of Wisconsin to the fact situation at hand, appellant sets forth that the order and judgment of the District Court granting respondents' motion for summary judgment should be reversed, and, although the appellant has never requested summary judgment, actually, from the facts, the defendants would have been found guilty of negligence as a matter of law and the only ques-

tions that should be submitted to the jury would be contributory negligence on the part of the plaintiff, if any, and damages, and a summary judgment should be granted in favor of the plaintiff as to the question of defendant's negligence.

CONCLUSION.

Appellant respectfully submits that the order and judgment granting summary judgment in favor of the defendants and against the plaintiff, and dismissing the complaint of the plaintiff in the above entitled action upon the merits should be reversed and, although the appellant has never requested summary judgment, actually, from the facts, the defendants would have been found guilty of negligence as a matter of law and the only questions that should be submitted to the jury would be contributory negligence on the part of the plaintiff, if any, and damages, and a summary judgment should be granted in favor of the plaintiff as to the question of defendants' negligence; but that in any event, the order of the District Court should be reversed.

Respectfully submitted,

N. PALEY PHILLIPS,
Attorney for Plaintiff-Appellant.

BERTRAM J. HOFFMAN,
Of Counsel.

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Appellant's Appendix

DOCKET ENTRIES

Filing Date	Description
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10/31/56	Complaint
10/31/56	Plaintiff's cost bond
10/31/56	Plaintiff's notice of taking deposition of deft., Leo Lieberman
11/7/56	Summons returned served 11/7/56
11/20/56	Answer
11/29/56	Plaintiff's notice of trial
1/18/57	Deposition of Leo Lieberman, taken 11/17/56
1/18/57	Deposition of Ann Warner, taken 11/17/56
7/25/57	Defendants' motion for summary judgment dismissing complaint, with supporting affidavit of Eleanor Lieberman
8/20/57	Affidavit of Ann Warner
8/21/57	Affidavit of Aaron Starobin

8/30/57	Affidavit of N. Paley Phillips, and Plaintiff's motion for order to inspect chair
9/17/57	Opinion of Court, finding for defendants
9/19/57	Order for judgment
9/19/57	Judgment dismissing complaint and action on the merits
9/23/57	Bill of Costs
9/23/57	Notice of entry of judgment
10/2/57	Plaintiff's notice of appeal
10/2/57	Bond for Costs on Appeal

1 Ann Warner, as plaintiff, citizen and resident of the State of California, brought this action against the defendants, Leo Lieberman and Eleanor Lieberman, citizens and residents of the State of Wisconsin, by filing a complaint in the office of the District Court, Eastern District of Wisconsin, on October 31, 1956.

On November 20, 1956, the defendants, Leo Lieberman and Eleanor Lieberman, by John F. Zimmerman and Shaw. Muskat & Paulsen, their attorneys, filed their answer to plaintiff's complaint.

The transcript of proceedings, examination of Ann Warner, plaintiff, was taken on November 17, 1956, on behalf of the defendants pursuant to Rule 30 of the Federal Rules of Civil Procedure; and that said transcript was filed in the office of District Court on January 18, 1957.

The transcript of proceedings, examination of Leo Lieberman, one of the defendants herein, was taken on November 17, 1956, on behalf of the plaintiff, pursuant to Rule 30 of the Federal Rules of Civil Procedure, and said transcript was filed in the office of the District Court on January 18, 1957.

Notice of motion and motion for summary judgment was made by the defendants, Leo Lieberman and Eleanor
2 Lieberman, by their attorneys, based upon all the records, files and proceedings herein and upon the deposition of the plaintiff, Ann Warner, and the deposition of the defendant, Leo Lieberman, on file with the Court, and the attached affidavit of the defendant, Eleanor Lieberman, in support of the defendants' motion for summary judgment, all of which was filed in the office of the District Court on July 25, 1957.

On August 20, 1957, the affidavit of Ann Warner, plaintiff, was filed in the office of the District Court in opposition to the defendants' motion for summary judgment. Attached to the affidavit of the plaintiff, Ann Warner, were exhibits

1, 2, 3 and 4, said exhibits being photographs of the chaise longue chair herein involved.

On August 21, 1957, there was filed in the office of the District Court in support of plaintiff's affidavit opposing defendants' motion for summary judgment, the affidavit of Aaron Starobin, an attorney associated with the office of N. Paley Phillips, plaintiff's attorney.

On September 10, 1957, the Hon. K. P. Grubb, Judge of the above named Court heard defendants' motion for summary judgment.

On September 17, 1957, there was filed in the office of the District Court, the opinion of the Hon. K. P. Grubb, Judge of the above named Court, granting defendants' motion for summary judgment.

On September 19, 1957, there was filed in the office of the District Court, the order for judgment signed by the Hon. K. P. Grubb on September 19, 1957, which order provided that summary judgment be entered in favor of the defendants and against the plaintiff, dismissing the complaint of the plaintiff, Ann Warner, and the above entitled action upon the merits with costs.

On September 19, 1957, judgment by the Court was
3 signed and filed, which judgment provided that the complaint of the plaintiff, Ann Warner, and the action be, and the same are, hereby dismissed on the merits.

Notice of entry of judgment was filed in the office of the District Court on September 23, 1957.

Notice of Appeal by the plaintiff, Ann Warner, was filed in the office of the District Court on October 2, 1957.

Bond for Costs on Appeal was filed on behalf of the plaintiff, Ann Warner, in the office of the District Court on October 2, 1957.

Respectfully submitted,

N. Paley Phillips

N. Paley Phillips

Attorney for Plaintiff

• • •

4 The above named plaintiff, by N. Paley Phillips, her attorney, complains of the defendants above named, and for her cause of action alleges and shows to the Court as follows:

1. That the plaintiff is a widow and that she is a buyer by occupation and is a citizen of the State of California, residing at 5875 Packard Street, Los Angeles, California.

2. That the defendants, Leo Lieberman and Eleanor Lieberman, are husband and wife, both being citizens of the State of Wisconsin, and residing at 7805 N. Boydway, Milwaukee County, State of Wisconsin; and that the defendant, Leo Lieberman, is in the printing business, and that his wife, Eleanor Lieberman, is a housewife.

3. That this is a suit of a civil nature arising under the laws of the State of Wisconsin, and that jurisdiction is founded upon diversity of citizenship in that the plaintiff is a resident and citizen of the State of California, and that the defendants are residents and citizens of the State of Wisconsin; and that the matter in controversy in this case, exclusive of interest and costs, exceeds the sum of $3,000.00.

4. That on the 12th day of July, 1956, the plaintiff, Ann Warner, was on the premises of the defendants at 7805 N. Boydway, Milwaukee County, State of Wisconsin; and that

5 the plaintiff, Ann Warner, was upon said premises at the invitation and request of the defendants; and that the said Anna Warner was seated upon a chrome lounge chair in the back yard of said premises located at 7805 N. Boydway, Milwaukee County, State of Wisconsin, and that said lounge chair belonged to the defendants, Leo Lieberman and Eleanor Lieberman; and that as plaintiff, Ann Warner, got up from said lounge chair and proceeded to walk around the front of said lounge chair, her foot caught on the front leg of said chair, which front leg of said chair defendants had allowed to remain in a damaged and broken condition a considerable period of time

prior to July 12, 1956, and that as a result thereof, plaintiff, Ann Warner, fell to the ground, sustaining severe injuries and damages as is set forth more specifically hereinafter.

5. That the defendants, Leo Lieberman and Eleanor Lieberman, were then and there negligent in the following respects:

(a) They permitted the previously referred to lounge chair to be used on their premises knowing that the front leg of said chair was broken and extended approximately six inches beyond the front of said chair, and that said defendants knew or should have known a sufficient length of time prior to July 12, 1956, that the leg of said lounge chair was broken and defective, and that it would be dangerous for the plaintiff, as well as any other person who attempted to use said lounge chair,

and that each of the foregoing acts or omissions were the proximate cause of the injuries and damages sustained by the plaintiff.

6. That as a result thereof, plaintiff, Ann Warner, was seriously injured; that amongst other injuries, she sustained a fractured right hip; that she has been and still is under the care of a physician; that she was hospitalized for a considerable period of time; that she suffered excruciating physical pain and mental anguish, and will continue to suffer pain and mental anguish in the future; that the injuries are permanent in their nature and will cause the plaintiff, Ann Warner, permanent disability; that her
6 ability to enjoy life in the future has been immensely impaired by said injuries; that she has been put to great expense and will continue to be subjected to great expense in procuring necessary medical and surgical at-

tention, and that plaintiff, Ann Warner, has suffered loss of earnings as the result of her injuries, and that as plaintiff, Ann Warner, is informed and verily believes, said injuries will continue to interfere with her ability to work in the future, in all to plaintiff, Ann Warner's damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Wherefore, the plaintiff, Ann Warner, demands judgment against the defendants in the sum of One Hundred Thousand ($100,000.00) Dollars, together with the costs and disbursements of this action.

N. Paley Phillips
Attorney for Plaintiff

• • •

11 Now comes the defendants Leo Lieberman and Eleanor Lieberman, by John F. Zimmermann and Shaw, Muskat & Paulsen, their attorneys, and for answer to plaintiff's complaint admit, deny and allege as follows:

1. Admit the allegations contained in paragraphs 1, 2, and 3 of plaintiff's complaint.

2. Deny that the defendants were guilty of any fault, negligence or omission in the respects mentioned in said complaint or otherwise.

3. Deny that by reason of any fault, negligence or omission on the part of the defendants, the plaintiff sustained damages in the sum of One Hundred Thousand ($100,000) Dollars, or any other sum.

4. Deny that the defendants caused any injury or damage to the plaintiff.

5. Deny the allegations contained in paragraph 4, except that your answering defendants admit that the plaintiff Ann Warner was a house guest of the defendants on July 12, 1956.

6. Deny the allegations contained in paragraph 5, and specifically deny each and all of the allegations contained

therein, as alleged or otherwise; allege that whatever injuries and damages the plaintiff sustained were caused
12 not because of any carelessness, negligence or omission on the part of your answering defendants, but were solely and proximately caused by the carelessness and negligence of the plaintiff in failing to exercise proper lookout and ordinary care for her own safety.

7. For answer to paragraph 6, deny knowledge or information sufficient to form a belief as to the nature and extent of plaintiff's injuries, whether she is still under the care of a physician, whether she was hospitalized for a considerable period of time, whether she will continue to suffer pain in the future, whether the injuries are permanent, whether the injuries will cause the plaintiff permanent disability, whether she has been put to great expense, whether she will continue to be subjected to great expense in procuring necessary medical and surgical attention, whether she has suffered loss of earnings, or whether said injuries will interfere with her ability to work in the future, as alleged or otherwise.

8. Further answering the complaint of the plaintiff herein, these defendants, except as hereinbefore admitted, specifically denied or otherwise answered, deny any knowledge or information sufficient to form a belief as to each allegation thereof.

Wherefore, these defendants demand judgment dismissing the complaint of the plaintiff herein, with their costs and disbursements against the plaintiff.

• • •

14 TRANSCRIPT OF PROCEEDINGS.

LEO LIEBERMAN, one of the defendants herein, called as a witness on behalf of the plaintiff, being first duly sworn to testify the truth the whole truth and nothing but the truth, was examined and testified as follows:

15 *Examination by Mr. Phillips.*

• • •

16 Q. Now, do you remember the day that your sister, Ann Warner, was injured?

• • •

A. No, I don't remember the day. I have forgotten.

• • •

Q. Well, on July 12th, that was the day of the week. Would you say that would be correct, about that time?

A. About that time.

• • •

19 Q. Did you actually see your sister fall?

A. No.

Q. You don't know what caused her to fall, then?

A. No, I don't know.

Q. Or actually how she fell?

A. No. I didn't see her fall.

• • •

21 Q. Now, do you recall this aluminum chaise longue that is set forth on Exhibit 1?

A. Yes.

Q. How long, do you know, did you have that chaise longue? In other words, had you had it the previous year?

A. Oh, yes. Three years or so.

Q. It was at least three years?

A. It was given to us as a present when we moved into our home.

Q. When had you moved in the home?

A. Let's see. We were in there four years now—over four years.

Q. It was given to you shortly after you moved in?

A. Yes, that is right.

22 Q. This would have been then the fourth summer you were going to use that chaise longue, or the third summer?

A. I believe the third summer.

Q. And during the winter what did you do with the chaise longue?

A. We stored it in the basement.

• • •

Q. Do you remember about when this last spring this chaise longue was put out into the yard?

A. I would say either the latter part of May or the early part of June.

Q. And did you yourself do that?

A. Yes.

• • •

Q. And when you put it out that spring in either the latter part of May or the early part of June, it is a fact, is it not, that you noticed that this chaise longue was not in proper working condition?

A. Yes.

Q. Would you say that the chaise longue when you put it out in the latter part of May or early part of

23 June was somewhat in the condition that it is on Exhibit 1?

• • •

A. Well, it could become placed like that if you moved it.

Q. In other words, when you put it on your yard in the latter part of May or early part of June, whatever time

it was, the left front portion of the front leg was not fastened to the footstool portion of the chaise longue, is that correct?

A. No, it wasn't fastened. No, it was broke. It was broke at that time.

• • •

Q. This support, was it fastened or should it be fastened to the footstool on the left side and on the right side? Is that correct?

A. There are screws there that fasten it, yes.

Q. Is that screws or bolts, do you know, or aren't you sure at this time?

A. I am not sure.

Q. But it is something that—

24 A. (Interrupting) Yes, some fastener, bolts or screws.

Q. Do you know how many on each side? In other words, is it one or two?

A. No, I don't know.

Q. But when you put this chair out in the spring of that year, the one side—that would be the left front side—was not fastened to the footstool portion; is that correct?

A. That is right, yes.

Q. Was that screw or bolt missing, did you notice, or was the aluminum broken?

A. Well, the bolt was missing. The aluminum wasn't broken.

Q. The bolt was missing?

A. Yes.

Q. Do you recall if the previous fall when you stored it in the basement if that bolt was missing?

A. The chair was in bad shape. I mean,—

Q. (Interrupting) In other words, the previous fall you had already noticed it was missing, is that correct?

A. Yes, yes.

Q. You hadn't fixed it all winter long?

A. No, I didn't fix it. No.

Q. And I assume I would be correct in saying that like the rest of us you were going to fix it during the winter?

A. I intended to fix it during the winter, but somehow or—.

Q. But you never fixed it?

A. No. I never got around to it.

Q. And when you put it out that spring you noticed again that it was not working?

A. It had to be fixed, yes.

Q. But you never got around to fixing it?

25 A. That is right.

Q. And if you would put the support underneath the—

A. (Interposing) Frame.

Q. (Continuing)—frame, it would stay there and hold, is that correct?

A. That is right, yes.

Q. But it wouldn't hold solidly, is that correct?

A. No, no.

Q. And if you would just push the footstool portion slightly, the support or leg would come loose; is that correct?

A. That is right, yes.

Q. And you knew that from the time you put it out there until the time of the accident?

A. Yes. That would happen, yes.

• • •

Q. Now, referring to Exhibit 1 again, and without setting forth as to the location of this aluminum chaise longue, this aluminum chaise longue as shown on this picture is the way it was similarly this way when you saw it right after your sister fell, is it not?

• • •

26 A. I don't remember.

Q. Well, did you see it right after your sister fell, did you not?

A. Yes, that is right.

Q. And when you saw it after your sister fell, that left leg was in front, was it not?

A. Yes, that was knocked out, yes.

Q. Well, was it similar to the way it was here then, was it not?

A. Yes, it was similar to that.

• • •

27 Q. When your sister fell and you heard the noise as you stated, did you come running up to her?

A. Yes.

Q. And when you came running up to her you saw her lying on the ground?

A. That is right.

Q. And she was right in front of this chaise longue referred to previously, is that correct?

A. That is right.

• • •

29 Q. Now, referring to Exhibit 2, and not referring to the location of this particular chaise longue, wherever it was in your yard, would you say that indicated generally the way the chaise longue was when you went over and when your sister was lying on the ground, particularly the left front portion thereof?

30 A. Yes.

Q. I show you Exhibit 3 and ask if that is a picture of the same chaise longue from the opposite side?

A. Yes, it is.

Q. And would you say that indicated the way the chaise longue was, particularly the left front portion of it, when you got over there when your sister was hurt?

A. Yes.

Q. And I show you Exhibit 4 and ask if that indicates the same chaise longue, more or less of a front view?

A. Yes.

Q. And was that about the same position of the chaise longue and the left leg when you got there when your sister was hurt?

A. I don't know the position of it, but it was pulled out. That I know. On that order, yes.

Q. In other words, this left leg was pulled out?

A. That is right, it was out.

Q. You don't know if it was just pulled out the same amount as this on here?

A. That I don't remember.

Q. Where was this place where she fell in reference to your yard? In other words, was it about near the patio, was it near the back of the yard, or was it near the tree, or about half way in the back?

A. About half way, I would say.

Q. And would you say that the back of the chair, that is, the backrest, was to the south and the footstool portion towards the north, generally?

A. Yes. Wait a minute. Well, they usually faced towards the west, towards the west they faced, towards the sun.

31 Q. Well, do you remember how it was then?

A. That I don't remember, no.

Q. Now, from the time you had put this chaise longue out that spring until the accident happened, people on occasions had used it to sit on?

A. Yes.

Q. It is a fact, is it not, that before this accident happened on occasions you saw that this leg was loose and pulled out?

A. Yes.

Q. And isn't it a fact that you should, or knew that somebody might injure themselves if they sat in the chaise longue with the leg pulled loose like that?

A. Oh, I never thought of it in that way, that anybody would be injured.

* * *

Q. But you knew that this leg was loose, did you not?

A. I knew the leg was loose and they could fall.

Q. All right. You knew that a person could fall on that?

A. That is right.

Q. And you knew that if that leg would pull loose while somebody would be either about to sit on the chair or getting up from the chair somebody could fall, did you not?

A. Yes.

Mr. Zimmerman: You mean stumble?

Mr. Phillips: Over that chair, over that leg.

A. Yes, it could happen, I suppose.

Q. You knew that the leg should have been fastened
32 to the support of the footstool?

A. That is right.

Q. You knew it was made that way?

A. That is right.

Q. You have tools in your house?

A. Yes.

Q. You have a certain number of screws and bolts and nuts, do you not?

A. Yes.

Q. And if you had taken the time you could have fixed that chair, could you not?

A. I could have fixed it, yes.

Q. It was just that you procrastinated?

A. I didn't fix it.

Q. Well, were you putting off fixing it?

A. That is right.

• • •

Q. Well, you stated, did you not, that when you put it away the previous fall you knew it was loose. Is that correct?

A. It was loose, yes.

Q. It was off of that piece, it was off that one left leg, is that correct? In other words, that bolt or screw, whatever it is?

A. Yes, the bolt was missing.

Q. The previous fall?

A. Yes, yes.

33 Q. And you were going to fix it during the winter, I understand, is that correct?

A. I was going to fix it, I don't know when, but I was going to fix it eventually.

Q. And you didn't fix it all that winter?

A. No, I didn't fix it.

Q. And when you put it out that spring you didn't fix it?

A. No.

Q. That is right, is it not, that you did not fix it?

A. Yes, I did not fix it.

Q. And you didn't even fix it for the month or so that it was out before the accident?

A. No, I didn't fix it at all.

Q. All the time you knew it was broken?

A. Yes, yes.

• • •

Q. You knew that, isn't that correct?

A. They were loose.

Q. The screws or bolts, whatever it is, were out?

A. Yes.

Q. And you knew that if it was moved slightly that the left support would pull loose?

A. Yes, it would pull loose. You had to put it back in position. That is right.

Q. As a matter of fact, isn't it a fact, or do you recall of anybody else falling on there, not getting hurt, previous to that?

34 A. No.

Q. Had you ever sat on that and it slipped down to the ground when it pulled loose?

A. No.

Q. Or didn't you sit on this chair very often?

A. No.

• • •

Q. In fact, when you carried the chair out from the basement that previous spring to put it in the yard, it was harder to handle because of that leg pulled loose, wasn't that correct?

A. Yes. I was going to start fixing it then, but—

Q. (Interrupting) You just neglected to do so?

A. Just neglected it again.

• • •

Q. By the way, I am correct in stating that you never—didn't tell your sister that this chair was broken or that it was loose, did you?

A. No.

• • •

Q. Would it be a fair statement to state that the
35 chaise longue the way it was just prior to the accident and the way it is indicated or the way you testified it was when you put it out that spring, that you knew with the chaise longue in that condition and with that left sup-

port or left leg not fastened with screws or bolts to the frame itself, that it would cause a dangerous condition?

• • •

A. Yes. I didn't know it could cause an accident or anything like that.

Q. Well, is it a fair assumption to state that you knew that if that leg would pull loose and somebody was seated on the chair or—

A. (Interrupting) They could fall off, yes, I presume. Not very—

Q. (Interrupting) In other words, you didn't presume that somebody would get seriously injured, is that it?

A. That is right, yes, I didn't.

Q. Well, but isn't it a fair statement to state that it had entered your mind that if that support would pull loose that somebody might fall?

A. Yes, that I can presume.

• • •

Q. But you didn't presume somebody would be badly hurt, is that right?

A. That is right, that is right.

• • •

44 ANN WARNER, the plaintiff herein, called as a witness on behalf of the defendants, being first duly sworn to testify the truth the whole truth and nothing but the truth, was examined and testified as follows:

45 *Examination by Mr. Zimmermann.*

Q. Will you state your name, please.

A. Ann Warner.

Q. How old are you?

A. Forty-eight.

Q. And you are a widow?
A. Widow.
Q. What was your husband's name?
A. Frank W. Warner.
Q. Your address in Los Angeles?
A. 5875 Packard Street.

• • •

Q. Now, on July 12th, 1956, you allege that you had an accident at the home of the Liebermans?
A. Yes.

• • •

46 Q. What were you wearing at the time of the accident?
A. A red slack suit, I guess they call it. You know, these short ones, pedal pushers, slack suit.
Q. What type of shoes did you have on?
A. Slack shoes, flatties, I guess they call them.
Q. Did you have a heel on them?
A. Yes, a slight heel.
Q. About what would be the measurement of the heel, the height of the heel?
A. I guess about like that (indicating); three-fourths of an inch, a half an inch.
Q. How long had you been at the Liebermans?
A. I arrived July 1st.
Q. And you had lived at their home until the time of the accident?
A. Between my sister and my brother.
Q. How many days did you spend at their home?
A. I don't know exactly, but I visited in between.
Q. Did you sleep always at the Liebermans?
A. Most of the time.
Q. Was anybody else from your family staying at the Liebermans besides Liebermans and their son?
A. No.

Q. Had you ever visited the Liebermans in their home at Boyd Way?

A. Never. My first visit.

47 Q. You were a house guest?

A. Yes.

Q. And I believe you were on vacation at the time, is that right?

A. Yes.

Q. You are the sister of the defendant Mr. Leo Lieberman?

A. Yes.

Q. Now, while you were there had you occasion to use the back yard?

A. Yes.

Q. Did they eat outside or anything like that prior to this time of the accident?

A. Yes.

Q. They had used the back patio to barbecue or to eat?

A. Yes.

Q. Had you used the longue in question before the time of the accident?

A. Not that I recall.

Q. Would you say definitely that you had never used it before?

A. I believe I can say definitely.

Q. So the date of the accident was the first time that you had ever sat on it?

A. That is right.

Q. And had you been in the back yard before?

A. Yes.

Q. Had you ever seen it before?

A. Yes.

• • •

48 Q. Now, do you know what caused you to fall?

A. Well, now, I know what caused me to fall but at that time I had no idea. I had been seated on the longue part of the—the stool part of the contour chair there and my brother was making steaks for dinner, but it got rather cool so we decided to eat indoors and they were getting too well done and everybody seemed to be running after the child; I mean, my sister-in-law was trying to get him washed up, you know, so I just sat down and took it easy. When he told me to come and get it, I, you know, the stool part is rather low and to get off, naturally I can't just get up, you have to sort of push yourself off, and I walked around and all of a sudden before I knew something caught on my right foot and I sort of took a fall forward and hit the ground. I didn't remember too much of it.

49 Q. Then I take it you don't know for certain over what part of the longue you stumbled or what caused you to fall?

A. No. It was something unseen that just caught me, but when I layed on the ground, why, I noticed that the part of the longue had gotten out and was encircled around my body. In fact, I had a black and blue mark from that open end there.

• • •

Q. You were seated on the stool?

A. I was seated.

Q. And then you got up?

A. And then I got up.

Q. And then you started to walk around to get to your steaks?

A. That is right.

Q. And that is when it happened?

A. That is right.

Q. And I believe there was sort of a call, "come and get it," you say?

A. Well, he just was facetious and said, "come and get it, the steaks are burning."

Q. You were anxious to get over there and get your steak?

A. Not too anxious.

• • •

50 Q. Do you know which foot it was that hit part of the longue?

A. The right.

Q. The right foot hit the leg of the longue or part of the longue, or whatever it was?

A. The right foot evidently was the one that was hit because it was doubled under me and when I fell, you know, I sort of as if you are trying to catch yourself, you know, when you just fall forward.

Q. Yes. Now, how long would you say you had been seated in the longue chair?

A. Not too long.

Q. About half an hour?

A. Oh, no. Just a few minutes.

Q. And when you sat down in the longue chair did you notice anything unusual about it?

A. None, because I wasn't paying—It was just a chair. I simply sat down.

Q. Everything looked proper on the chair to you?

A. It did at the time.

Q. And the leg, the front leg, was in the—

A. (Interrupting) I didn't notice.

Q. It was apparently in the proper place or you would have noticed it, is that right?

A. I really didn't notice.

51 Q. At least there was nothing to attract your attention that anything was wrong with it?

A. Well, it wobbled a little when I sat down.

Q. It did?

A. Uh-huh.

Q. Did you notice that the screws were out—

A. (Interposing) No.

Q. (Continuing)—in any part of the longue?

A. No.

Q. Did you look to see whether that—

A. (Interrupting) No.

Q. Now, the screws on the chair are clearly visible to you, I mean, or the lack of screws, are they not, in that type of a chair?

A. I have no idea.

• • •

Q. While you were a house guest at the Liebermans did anyone say anything to you about the longue chair?

A. No.

Q. Or did they mention it at all in any way?

A. None. No mention.

Q. You just saw it out there?

A. I just saw it out there.

Q. Now, when you got up out of this chair and stood up and started to go towards the patio—that is the direction you intended to go, is it not?

A. Yes.

• • •

52 Q. When you were sitting in this longue chair, the back of yourself was towards the house, is that correct?

A. Yes.

Q. Did you stand up on the right side of the chair or on the left side?

A. Left side.

• • •

53 Q. Now, do I understand that you were sitting on what portion of the stool—I mean on what portion of the chair?

A. On the lower portion, just on the stool part here.

Q. Just on the stool part?

A. Yes.

• • •

Q. Well now, if the house faces in an easterly direction, as we know it does, then the direction you were facing would be the west?

A. Well, I was watching the railroad tracks.

54 Q. Yes. That is the westerly direction.

A. I'm not sure.

Q. And the chair itself, the end of the chaise longue, would be facing in a southerly direction. Is that correct?

A. I remember my back was toward the house and I was sitting at the end of the chaise longue and Leo called and asked—told me to come and get into the house to eat, and I walked around and as I walked around something caught my right leg and that was it. Everything happened so sudden. At that time I had no idea of direction. I am a newcomer. Everything happened so sudden.

Q. Had you seen either Mr. or Mrs. Lieberman or their child use the chair at any time while you were there?

A. No, I haven't.

• • •

Q. Had you seen anyone else use that longue chair at any time when you were there?

A. I wasn't in the back yard more than once or twice.

Q. Did you at that time?

A. No.

• • •

55 Q. When you started to walk toward the patio, were your eyes in the direction of where Mr. Lieberman was standing?

A. You mean when I just started to walk?

Q. Yes.

A. No, it was facing the next door, the next house.

Q. Where were you looking at that time just before the accident?

A. I was just looking, you know. Just looking.

Q. So at least you weren't looking down, but you were just looking?

A. That is right. I was sort of daydreaming. This is my first visit to my brother's home and I was very proud of him.

Q. I may have asked you this, but was there anything in your hands, a book or anything else?

A. Nothing.

Q. Just before the accident happened you were on your feet, is that correct, standing up?

Mr. Phillips: Well, do you mean how long before?

Mr. Zimmermann: Well, just before she got hurt.

Q. You were on your feet?

A. I was on my way to walk.

Q. You were standing on your feet?

A. Yes.

• • •

56 Q. As you fell, do you recall hitting any part of the chaise longue?

A. Yes.

Q. What part of it did you hit?

A. I don't know what part I hit but I remember hitting the chaise longue as I fell.

• • •

72 The question is, there was nothing to prevent you from seeing that the screws were out in this longue chair?

A. I didn't see anything. That is all I can say.

73 Q. When you sat down in the chair, sofar as you observed the chair, the longue chair, everything was in its proper place?

A. As far as I knew.

Q. Sofar as you remember, the front leg of the longue chair was in its proper place at the time you sat down.

A. Yes.

Q. When you used the longue chair, you have testified that you were facing in a westerly direction, and my question is: were you sunning yourself a little bit or just resting there prior to dinner?

A. Just sitting. I don't believe—I don't think the sun was out. I think it was just on the way out.

Q. As you sat on the end of that longue chair, your brother was preparing the steaks, or whatever there was to eat, at the barbecue place on the patio?

A. Yes.

Q. And he called, "come and get it, the steaks are ready," or something to that effect, and then you got to your feet and started out, and then you fell; is that correct?

A. Yes.

Q. And is it correct that you don't know over what portion of the stool that you stumbled, or what caused you to fall?

A. As I got up I walked around and all of a sudden it just happened so suddenly, something caught on my leg and I plunged, but my leg was—it was in a very unnatural position. It was, you know, crossways like this (indicating).

* * *

74 *Examination by Mr. Phillips.*

Q. Did you see as soon as—shortly thereafter, after you fell, what caused you to fall?

A. Yes.

* * *

Mr. Phillips: Just one more question.

Q. And can you tell us what it was that you saw afterwards that caused you to fall?

A. The foot of the longue was out.

• • •

Q. At any time before you fell did you see the foot of the longue out of place?

A. As I say, I just sat—

Mr. Phillips (interrupting): No. Just answer that yes or no.

A. No.

• • •

77 Please Take Notice, that upon all the records, files and proceedings herein, and upon the depositions of the plaintiff Ann Warner and the defendant Leo Lieberman on file with the Court, and the affidavit of the defendant Eleanor Lieberman attached hereto, the defendants Leo Lieberman and Eleanor Lieberman, by their attorneys, move this Court for entry of summary judgment herein, in accordance with Rule 56 of the Federal Rules of Civil Procedure.

A Brief setting forth the position of the defendants is filed herewith.

The Court is respectfully requested to set a date and time for argument of this motion.

Dated this 24th day of July, 1957.

John F. Zimmermann and
Shaw, Muskat & Paulsen

.....

John F. Zimmermann and
Shaw, Muskat & Paulsen
Attorneys for defendants.

• • •

80 State of Wisconsin,
Milwaukee County—ss.

Eleanor Lieberman, being first duly sworn, on oath deposes and says: that she is one of the defendants in the above entitled action, and makes this affidavit on behalf of herself and the defendant Leo Lieberman in support of their motion for summary judgment herein.

Affiant avers she has personal knowledge of the facts as set forth in this affidavit, and that defendants have a good defense on the merits to all of plaintiff's claims.

Affiant avers that she did not witness plaintiff's accident, that she did not see the plaintiff fall nor did she observe what the plaintiff was doing just before the accident. Affiant avers that at the time of the accident affiant was working in the kitchen in the defendants' house and that the first she knew of the accident was after plaintiff had fallen. Affiant also avers that there was no-one else who witnessed the plaintiff's fall.

Affiant avers that although she knew that there were several screws missing from the chaise longue during
81 the summer of 1956 prior to the accident she and the child of the defendants used the chaise longue during that time with the screws missing, and to the best of affiant's knowledge no-one had ever been injured because of the condition of the chaise longue before plaintiff's accident.

Affiant further avers that she did not see the legs of the chaise longue protruding or extending beyond the front or side of the chaise longue before the accident to the plaintiff, although she did see the legs of the said chaise longue protrude after the accident when the plaintiff was entangled in the said longue.

Affiant further avers that prior to the accident she had used the chair carefully, being aware of its condition, and

that she had never told the plaintiff of its damaged condition.

(Mrs.) Eleanor Lieberman

Subscribed and sworn to before me
this 22 day of July, 1957.

Alan Shafrin
Notary Public,
Milwaukee County, Wis.

My Commission Expires: June 1, 1958.

• • •

82 State of California,
Los Angeles County—ss.

Ann Warner, being first duly sworn on oath deposes and states that she is a citizen and resident of the City of Los Angeles, State of California, and that she makes this affidavit to oppose the motion of the defendants for summary judgment in the above matter.

Your affiant sets forth that she never used the chaise lounge prior to the time of the incident involved and that was the first time she came in contact with it in any way. She had seen the chaise lounge previously but when she did see it the leg apparently had been pulled under it and there was nothing unusual about it from a casual observation.

Your affiant further states that no one had ever advised her that the chaise lounge was broken or to be careful when sitting on it.

That just prior to the time of the incident, your affiant sat on the chair portion of the chaise lounge with its back to the south and the footstool portion to the north. That your affiant was facing west with her back to the home of the defendants, that she sat on the chaise lounge for a short period of time when she heard her brother call to

her to come in and eat. That the chaise lounge, where one sits, is considerably lower than an average chair and that in order to get up one ordinarily has to push on the edge of the lounge in order to get their body up, as affiant sat on the edge of the chaise lounge waiting to be called in, it was impossible for her to notice anything unusual about the chaise lounge. That as she pushed herself off and started to walk around the front of the chaise lounge or to the north, she had not taken more than a step or two when she fell down because her right foot became entangled in the leg of the chaise lounge which was loose and not fastened and which apparently was pushed to the west as your affiant got off the chaise lounge.

That from the time your affiant got up until she fell about one second elapsed. That there was no reason for your affiant to look to see if the leg of the lounge was pushed forward and when she got up your affiant could not, in that fraction of a second, notice the fact that the left leg was unfastened and had pushed forward causing your affiant to trip on it and causing the injuries she sustained.

Your affiant again sets forth that she sat on the chaise lounge but a few minutes; that it was impossible to notice from sitting on it that the leg was loose. That before your affiant sat on the chaise lounge, she looked about her at the house and yard and there was nothing hazardous or perilous visible, as there was nothing of peril that could be seen or observed.

That exhibit "1" which is attached to this affidavit is a good photograph of the chaise lounge and the condition of fastened portion of the leg is what caught your affiant's right foot and caused her to trip. That the same is also shown in exhibit "2" attached hereto; and that exhibit "3" shows the chaise lounge and the side on which your affiant was seated and would be a very close indication of what caused your affiant to fall as the slight

pushing of the chaise lounge in order for your affiant to get up caused the unfastened portion of the leg to turn in a swivel or clock-wise action and pull away from the seat of the lounge so that as your affiant was walking around the front, the same caught her right leg tripping her and injuring her.

That when your affiant was tripped, by something which she subsequently ascertained was the unfastened left leg of the chaise lounge, your affiant at first did not realize what caused it until she was on the ground and saw her foot caught in the loose leg of the chaise lounge which leg apparently swiveled clock-wise just as your affiant was getting up from the chair and was about to walk in front of the chair to the house which would be the natural and customary thing for anyone to do.

That regarding looking, your affiant looked a minute or so prior to the time of the incident when she sat on the chaise lounge at which time the leg was in its normal position but in view of the fact that but a second elapsed before she tripped, there was no opportunity to see the defective left leg which had swiveled to the front of the chair and particularly to the left front corner thereof, nor was there any need for affiant to look down as she did not expect any entrapment as there had been nothing in front of the chair prior to the time she sat down; and it would be impossible for your affiant or anyone else to expect the leg to pull out in such a manner as to entangle the right foot of affiant and trip her.

85 From the time that affiant started to get up from the chaise lounge until she tripped during a period of approximately one second or so, she did glance at the house to the north which was in her direct line of vision as she was getting up and turning clockwise herself.

Your affiant definitely states that she knows what caused her to fall but in the instant she was falling she did not

know as it was impossible for her to know what tripped her until she was lying on the ground with her leg entangled in the leg of the chaise lounge.

Affiant further states that exhibit "4" is likewise a true and correct photograph of the chaise lounge as it appeared after the fall.

Ann Warner

Subscribed and sworn to before me
this 9th day of August, 1957.
Ann Raetz
Notary Public,
Los Angeles County, Calif.

My commission expires 9/1/60.
(Seal)

EXHIBIT NO. 1

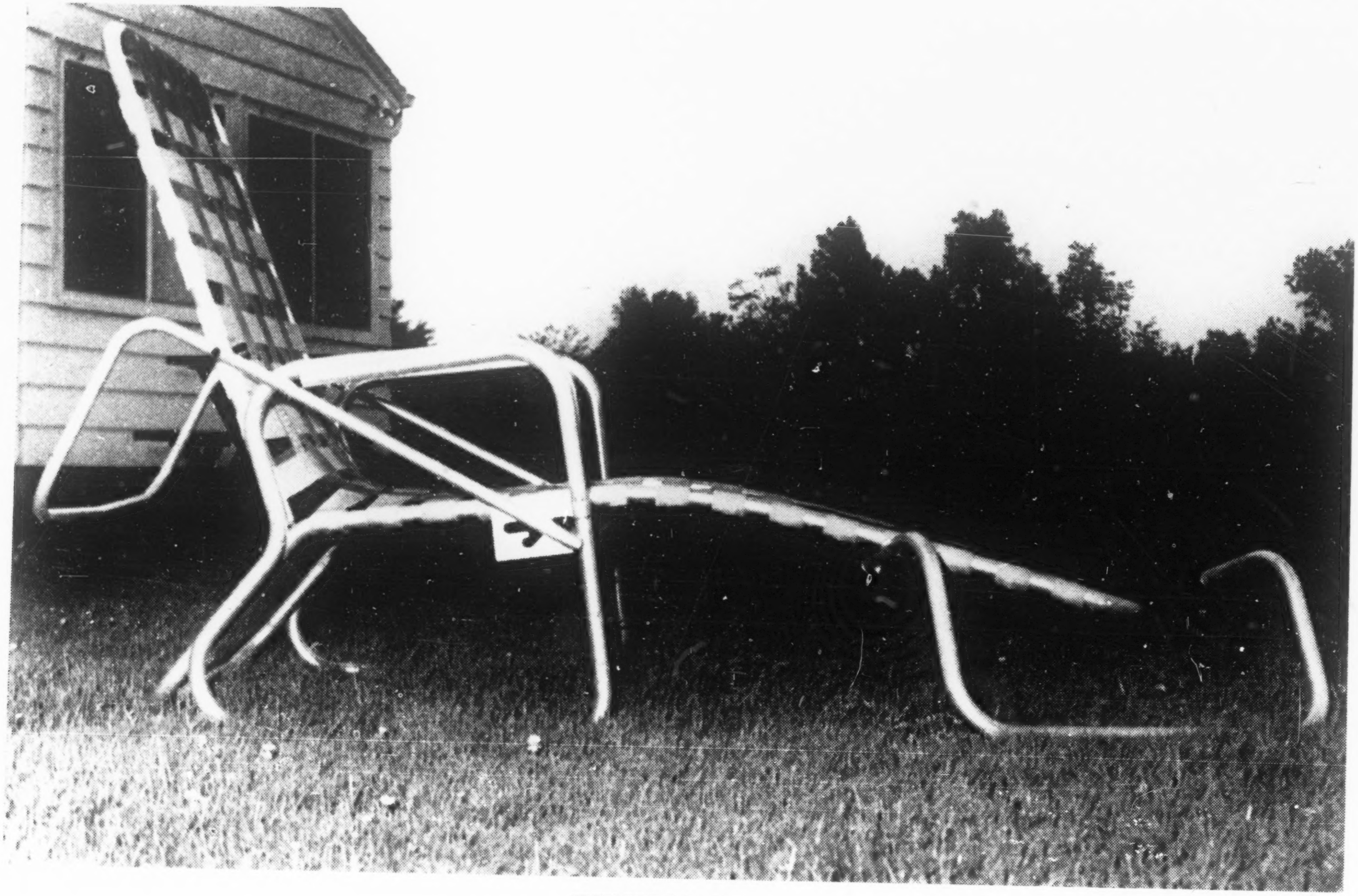

EXHIBIT NO. 2

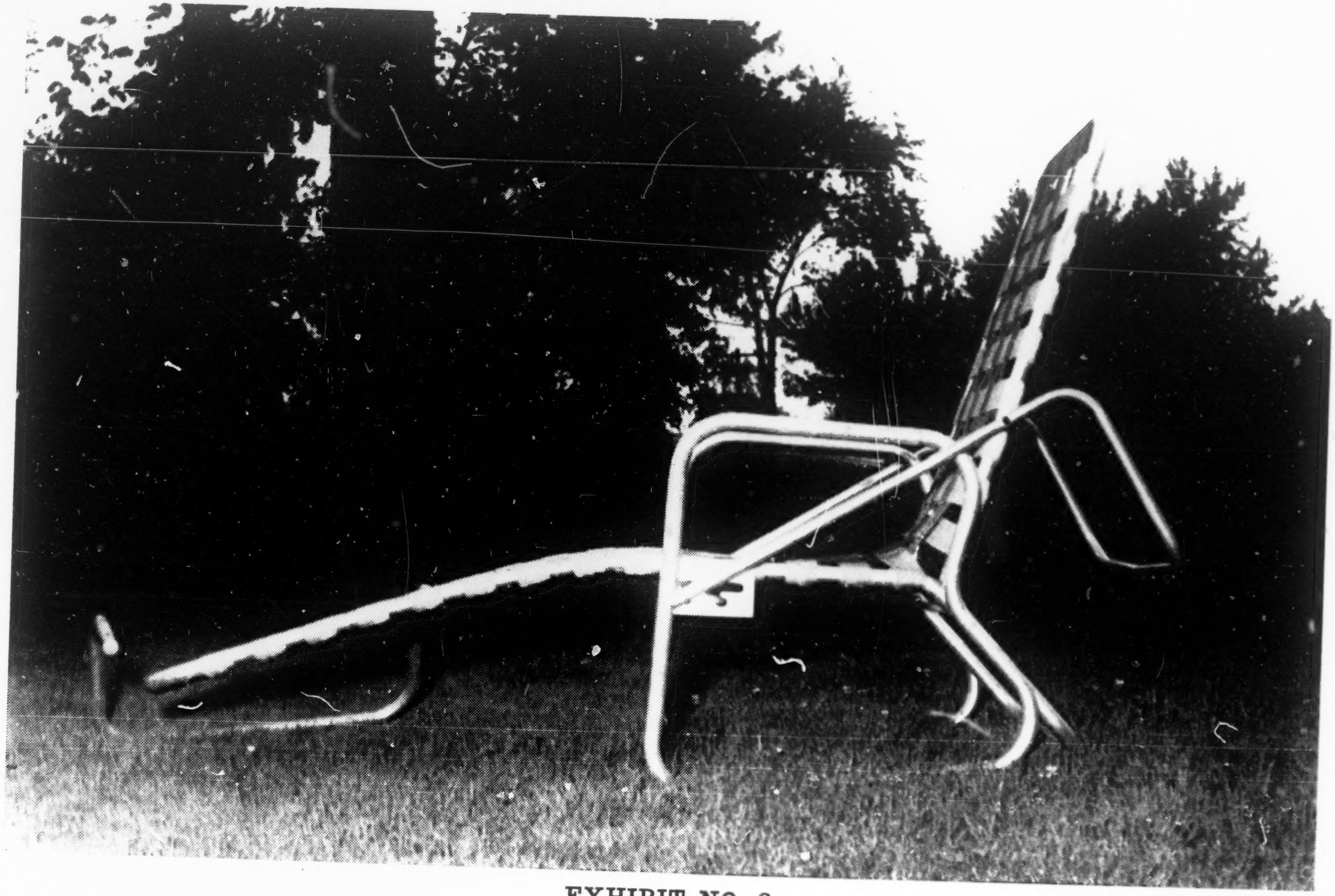

Exhibit No. ___

EXHIBIT NO. 3

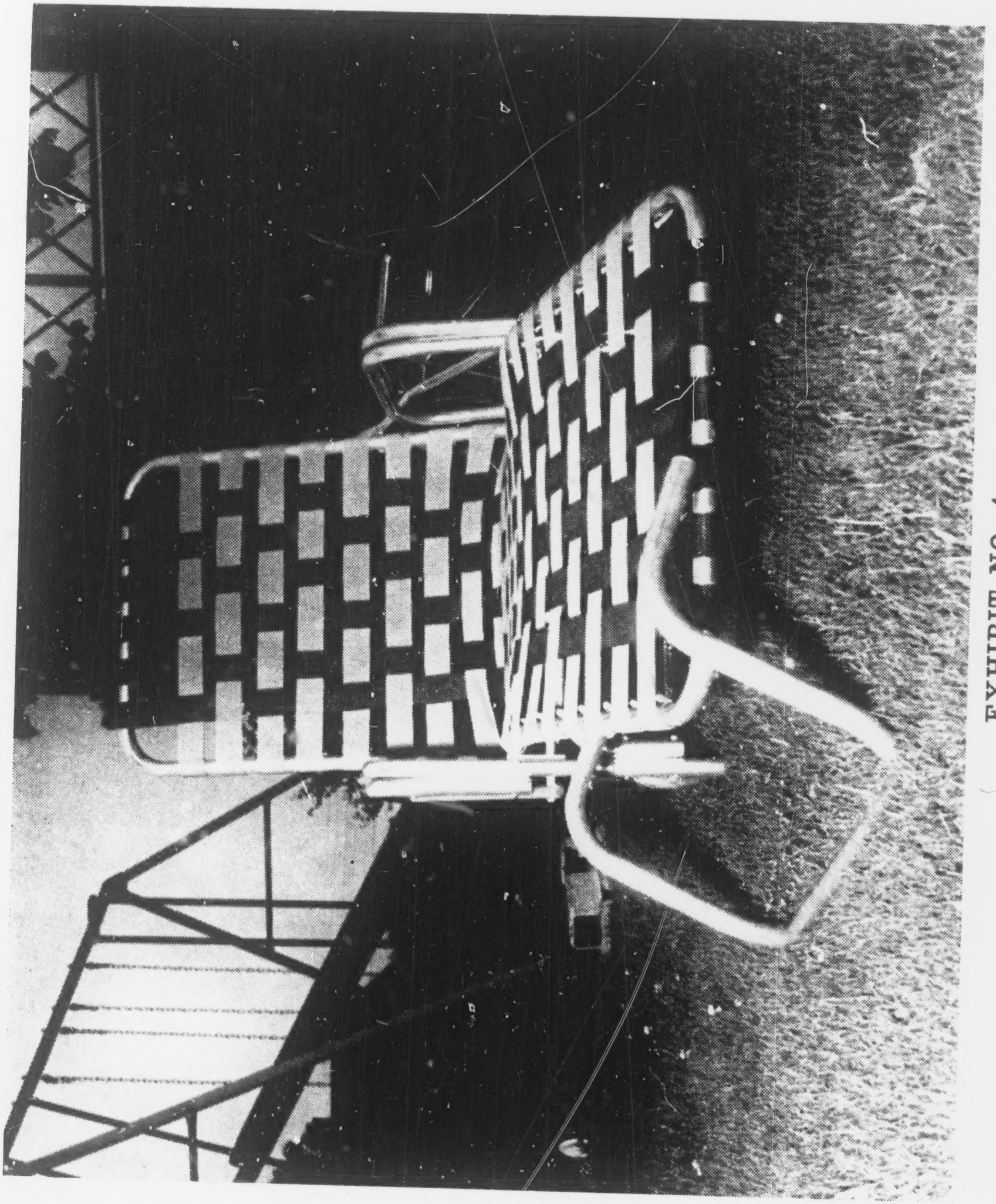

EXHIBIT NO. 4

* * *

86 State of Wisconsin,
Milwaukee County—ss.

Aaron Starobin, being first duly sworn on oath, deposes and states that he is an attorney associated with the office of N. Paley Phillips; that on August 20, 1957 he personally examined an aluminum tubular frame chaize longue presently stored on the premises of 3017 N. Stowell Avenue, in the City and County of Milwaukee, State of Wisconsin, and which aluminum chaize longue was one as stated by Attorney John F. Zimmermann to be the chaize longue involved in the above entitled action.

That the examination by affiant revealed that there were a total of three screws missing from that portion of the chaize longue which was heretofore referred to as the stool portion thereof; that originally the front legs of said chaize longue were attached thereto by four screws, two on each side, and that at the time of his examination only one screw remained which was on the righthand side.

That upon seating oneself on that portion of the chaize longue known as the stool portion, one would not have knowledge that this longue was unsafe, if the legs had been pushed below it. That upon standing up and pushing
87 the chaize longue to one side in order to assist in getting up because of the low height of the longue, the metal legs attached to the stool portion of the chaize longue could be seen to swing out from the chair proper in a clockwise fashion and could easily cause one to trip as one would not expect that.

Affiant further states that at the time of his examination the condition of the chaize longue appeared to have been changed from the photographs thereof apparently taken a few days after the incident involved in that the

front legs had been pulled apart, thereby protruding from the sides of the chaize longue when put in position, and that the chaize longue seemed to be loosened generally.

Aaron Starobin

Subscribed and sworn to before me this 21st day of August, 1957.

N. Paley Phillips
Notary Public,
Milwaukee Co. Wis.

91 OPINION.

This matter is before the court on defendants' motion for summary judgment, pursuant to Rule 56, based upon the records, files, depositions and affidavit of the defendant Eleanor Lieberman. There have been filed in opposition to the motion, an affidavit of the plaintiff and an affidavit of Aaron Starobin, one of her attorneys.

On this motion only the facts most favorable to the plaintiff and the most permissible inferences from those facts need be considered. The court is not authorized to determine issues of fact or permissible inferences in considering this motion.

There is some conflict and inconsistencies between the testimony of plaintiff in her deposition and her affidavit filed in opposition to this motion. The court can consider on this motion only the portions most favorable to her, regardless of how much of her testimony in the deposition may be in conflict or inconsistent with her affidavit.

Taking the portions of the record by way of depositions and affidavits most favorable to the plaintiff, it ap-
92 pears that she was the gratuitous house guest of defendants, she being a sister of the defendant, Leo Lieberman. She arrived at the home of the defendants on July 1, 1956 from California. On July 12, 1956 she sus-

tained the injuries for which she brings this suit. She had been seated on a chaise longue in the yard of the defendants. Defendant Leo Lieberman was grilling steaks. Defendant Eleanor Lieberman was in the house. This chaise longue had never previously been used by the plaintiff. She had seen it but did not observe anything wrong with it. The back of the chair portion of the chaise longue was toward the south and the footstool portion was to the north. Plaintiff was facing west with her back toward the home of the defendants. She sat on the chaise longue for a short period of time and then heard her brother, Leo Lieberman, call for her to come and eat. The portion of the chaise longue where one sits is considerably lower than the average chair, and in order to get up, one has to push on the edge of the longue in order to get the body up. As she pushed herself off and walked around the front of the chaise longue, or to the north, she had taken only a step or two when she fell because her right foot became entangled in the leg of the chaise longue which was loose and not fastened and "which apparently was pushed to the west" as she got off the chaise longue. As she sat on the chaise longue, she could not notice that the leg was loose. The loose leg of the chaise longue swiveled in a clockwise direction and pulled away from the seat as she was walking around the front and it caught her right leg, tripping her. At the time she was seated on the chaise longue, its leg was in a normal position. In her affidavit, plaintiff
93 states that there was no opportunity to see the defective leg which had swiveled from the front of the chair before she tripped. Photographs of the chaise longue are attached to and made a part of plaintiff's affidavit, which photographs indicate that it is a very common type of aluminum and plastic garden chaise longue.

The affidavit of Aaron Starobin states that he examined the chaise longue on August 20, 1957; that there were a

total of three screws missing from the stool portion of it, that originally the front legs were attached by four screws, two on each side, and that at the time of his examination, thirteen months after the injury, only one screw remained which was on the right-hand side; that he sat on it and in getting up, the stool portion could be seen to swing out from the chair portion in a clockwise fashion.

The testimony of defendant Leo Lieberman in his deposition indicates, among other things, that during the winter prior to the accident, the chaise longue had been stored in the basement; that when he took it out in late May or early June, the front portion of the front leg was not fastened to the footstool portion of the chaise longue; that the support should have been fastened to the footstool portion on the left side and the right side; that the left front side was not fastened, that a screw and bolt were missing; that when it had been stored the previous fall, it was in bad shape; that he noticed that it needed fixing but that he had not fixed it. That when he took it out in the spring, he again noticed that it was not working and that it required repair. That if he would put the sup-
94 port underneath the frame, it would stay there and hold, but that it wouldn't hold solidly; that if the foot stool portion was pushed slightly, the support leg would come loose; that he knew a person could fall on the leg that was loose and that it would move when a person was either about to sit in it or get up from it.

The affidavit of Eleanor Lieberman set forth that she knew there were several screws missing from the chaise longue in the summer of 1956 and prior to the accident; that she and the child of the defendants used the chaise longue during that time with the screws missing, and to the best of her knowledge no one had ever been injured because of the condition of the chaise longue before plaintiff's accident. That she did not see the legs of the chaise

longue protruding or extending beyond the front, or side of the chaise longue before the accident, although she did see the legs of the chaise longue protrude after the accident when the plaintiff was entangled in the chaise longue. That prior to the accident she had used the chair carefully, being aware of its condition, and that she had never told the plaintiff of its damaged condition.

The ultimate facts most favorable to the plaintiff which could be found by a jury may be summarized as—

(a) A chaise longue with three missing screws or bolts on the part that the occupant uses as a foot rest so that on occasion and given the right impetus, that part would swing out.

(b) This condition existed for two summer seasons.

(c) There had been no previous injury or untoward
95 incident in the use of this chaise longue.

(d) Defendants were aware of this condition and, notwithstanding that condition, used the chaise longue.

(e) Plaintiff was not aware of that condition.

(f) Defendants did not inform plaintiff of that condition.

(g) Plaintiff was a gratuitous guest of defendants.

This question must be tested by the law in Wisconsin, it being a diversity case, and the acts having happened in Wisconsin.

The leading case involving host and guest in Wisconsin is the case of *Greenfield* v. *Miller,* 173 Wis. 184, 180 N.W. 834. In that case plaintiff was defendant's gratuitous guest. Defendant's floors had been recently finished, were highly polished and had had oriental rugs thereon. While walking through the house, plaintiff slipped on a small rug about four feet square and sustained injuries. On motion of defendant, the trial court directed a verdict in defendant's favor. The Supreme Court affirmed. Plaintiff's counsel urged that the question was whether defendant was

negligent, a question of ordinary care. Plaintiff urged that it was defendant's duty to render the premises reasonably safe for guests. The court points out that plaintiff's counsel was endeavoring to bring the case within the legal definition of invitor and invitee or licensor and licensee where there would be liability for active negligence.

After reviewing cases in Wisconsin and elsewhere, the court points out that the legal distinction between
96 implied invitor and invitee and a mere licensor and licensee is well-marked by the decisions, "the general rule being that there is no liability on the part of the licensor for injury sustained by those coming on his premises as mere licensees, unless there is something on the premises in the nature of a trap which fact proximately caused the injury, or the licensor was guilty of active negligence." And, again on page 189 the court states:

> "* * * He (a guest) stands on no better footing than the bare licensee and must take the premises as he finds them, subject, however, to the limitation that the licensor must not set a trap or be guilty of active negligence which contributed to the injury." (Parenthesis supplied.)

The court quotes with approval from *Plummer* v. *Dill*, 156 Mass. 426, 31 N.E. 128, as follows:

> "'* * * The principle of the decision seems to be that a guest, who is receiving the gratuitous favors of another, has no such relation to him as to create a duty to make the place where hospitality is tendered safer or better than it is. * * *'"

And, again at page 190 the court states:

> "Of course in the class of cases last above mentioned it must appear that the licensor was not guilty of any wilful act of negligence or and new danger created by the licensor. As stated in other cases, where the relation of licensor and licensee exists, the licensee can only recover for setting a trap or for active negligence.

"The court is of opinion that in the instant case the relation of licensor and licensee, under the allegations of the complaint, existed under the general rule that where a guest is invited to come into the premises of the host for social or benevolent purposes only, the relation thus created is one of licensor and licensee and the rule of ordinary care does not apply."

The rule of Wisconsin Courts in relation to the duties owed by a host to a gratuitous guest have been applied
97 in automobile cases even though Wisconsin has no "guest" statute. Thus, speaking of the duty owed to the guest by the host in an automobile case, *Cleary* v. *Eckart,* 191 Wis. 114, 210 N.W. 267, the court stated:

"It is well settled that the guest must accept the premises of the host as he finds them, it being only the duty of the host to warn the guest of lurking dangers."

Following that the court quoted from its decision in *O'Shea* v. *Lavoy,* 175 Wis. 456, 185 N.W. 525, as follows:

"'The guest has no right to a greater security than that enjoyed by the host or other members of his family. The host simply places the premises which he has to offer at the disposal and enjoyment of his guest upon equal terms of security.'"

Again, it states the rule in the following language:

"'As to the gratuitous guest in a vehicle on a public highway, the owner or driver of such vehicle owes to such guest the duty of exercising ordinary care not to increase the danger to the guest or to create a new danger.'

"When one drives his car to his neighbor's door and invites his neighbor to an automobile ride, does not the neighbor accept the hospitality which the host has to offer? That hospitality consists of the car and the driver. When he accepts the invitation and enters the automobile, does he not accept the car in the condition in which it exists and such skill as may be possessed on the part of the driver?"

It recently applied that rule even where the relationship was not that of host and guest but licensor and licensee.

In *Brady* v. *Chicago & N.W. R. Co.*, 265 Wis. 618, 62 N.W. 2d 415, the court stated:

> "* * * Under such circumstances the users of the bridge are gratuitous licensees rather than trespassers, but licensees take the permises as they find them and the owner owes them no duty except to refrain from injuring them by active negligence. * * *"

98 In *Lewko* v. *Chas. A. Krause Milling Co.*, 179 Wis. 83, 190 N.W. 924, the court stated:

> "* * * The law is well settled in this state and in most of the sister states that a mere licensee on private property takes the premises as he finds them. The owner owes him no duty save to refrain from active negligence rendering the premises dangerous. * * *
>
> "Useful and not grossly negligent conditions and appliances on private property do not render the owner thereof liable to mere licensees or trespassers. To do so they must be of such a character as to constitute active negligence. The pit in question was open, obvious, and useful, and though dangerous to children, and perhaps to adults also, it cannot be classed as a hidden trap or a concealed death-dealing instrumentality."

While this case must be determined under the law of Wisconsin, it is apparent that the Wisconsin rule is in accord with the general rule in many, if not most, jurisdictions. Thus it is stated in 25 A.L.R. 2d 600, in an annotation entitled "*Liability for injury to guest in home or similar premises*"—

> "* * * In summary, some of the courts have equated the rule of legal liability with that of homely hospitality, saying that the host should treat the guest as a member of the family, and the guest, on the other hand, should accept the conditions ordinarily prevalent in his host's home without cavil or complaint."

And the general rule is stated in *65 C.J.S., Negligence,* S35, page 455 and 496, as follows:

> "* * * A social guest on the host's premises or in his home must take the premises as he finds them,

with no greater right than a mere licensee with respect to the host's liability for injuries to the guest.

"Accordingly, in the absence of statute imposing such duty, the owner or person in charge is ordinarily under no duty to use ordinary care to make or keep the property or premises in a reasonably safe condition for the use of licensees, or to keep the usual condition of the premises up to any particular standard of safe-
99 ty; nor is he under any obligation to take any measures to protect mere licensees from injury due to the condition of the property, or from dangers incident to the ordinary uses to which the premises are subject. There is ordinarily no duty to provide safeguards for licensees, even though there are dangerous holes, pitfalls, obstructions, or other conditions near to the part of the premises to which the permissive use extends. It follows that, as a general rule, the owner or person in charge of property is not liable, as for negligence, for injuries to licensees due to mere defects or dangers in the condition of the property or premises, or, as it has been expressed, due to passive negligence or acts of omission."

Wisconsin, as is true in many states, has passed and there is in effect, a so-called "safe place statute", placing heavy burdens on the owners of public buildings and employers with reference to safety. Employers, under this statute, are required to have furniture in good repair, if the rule as between host and guest, where the smallest degree of care is required, were as urged by plaintiff's counsel, there would have been no need for a safe place statute as everyone, owners of public buildings, employers, as well as private homes, would be required to use ordinary care to see that the premises and the furniture were safe for guests.

It is not uncommon to have furniture that is out of repair and yet is useful and usable. The law of Wisconsin is not such as to place a requirement to avoid ordinary

negligence on the part of the home owner with reference to his guests.

Neither counsel has cited, nor has the court been able to find any Wisconsin decisions definitely defining the term "trap", or the term "active negligence" as applied by the Wisconsin Supreme Court in host and guest cases.

100 Among other holdings, it has been held that a stairway in a home with a door opening forward is not a trap. *Tempest* v. *Richardson,* 299 P. 2d 124 (Utah). A structural defect in a stairway which gave the second step the appearance of the first step, was not a trap. *McHenry* v. *Howells,* 272 P. 2d 210 (Or.).

While cases in other jurisdictions are not in point, it is interesting to note that in the following cases the court held that defects were neither a trap nor active negligence:

A guest tripping over defective weather stripping on the doorsill, *Roth* v. *Prudential Life Ins. Co. of New York,* 42 N.Y.S. 2d 592; a child falling over a wooden stake left in the ground a month after it was used by the landowner, *Passer* v. *Schimmel,* 158 N.Y.S. 2d 694; a guest being injured when a crudely constructed loose stone in a walk rolled loose while the guest stepped on it, causing him to fall, *Wilder* v. *Ayers,* 156 N.Y.S. 2d 85; a guest being injured because of broken concrete in the passageway owned by the defendant, *Comeau* v. *Comeau,* 189 N.E. 588, 92 A.L.R. 1002; a guest catching the heel of her shoe in a broken register, *Colvert* v. *Ricker,* 49 N.E. 2d 459, 147 A.L.R. 647.

It has been held that active negligence relates to activities conducted on premises, whereas passive negligence denotes negligence which permits defects or causes dangers upon property. *Wolfson* v. *Chelist,* 278 S.W. 2d 39 (Mo.). Accord *Potter Title & Trust Co.* v. *Young,* 80 A. 2d 76 (Pa.). Acts involving condition of premises are usually

passive negligence. *Colgrove* v. *Lompoc Model T Club,* 124 P. 2d 128 (Cal.).

101 Failure of an employer to discharge the duty of furnishing employees with tools and his failure to use reasonable care in that respect is passive negligence. *Stallings* v. *Whisenant,* 159 S.W. 2d 559 (Tex.) Failure to remove a box placed in a skating rink was passive negligence. *Dixon* v. *McDonald,* 130 S.W. 2d 884 (Tex.). Failure to fasten screens tightly is not active negligence. *Chelefou* v. *Springfield Inst. for Savings,* 8 N.E. 2d 769.

In some jurisdictions the test is laid down as to whether the host realizes that the condition involves an unreasonable risk to the guest. While that is not the rule in Wisconsin, and even if it were, one would be loathe to hold that a jury could find that a condition of a chair which had been satisfactory to the family of the owner for two years and on which no one had previously been hurt or had any trouble created an unreasonable risk to the guest.

The foregoing makes it unnecessary to consider the other point urged by the defendants, namely, that it would be permitting speculation on the record here made to permit a jury to find that the unbolted chaise longue was the actual cause of plaintiff's fall. Defendant's motion for summary judgment is hereby granted.

Dated, Milwaukee, Wisconsin, this 12th day of September, 1957.

K. P. Grubb
U. S. District Judge

103 ORDER FOR JUDGMENT.

This cause came on to be heard by the Court on the motion of the defendants for summary judgment, as authorized by Rule 56 of the Federal Rules of Civil Procedure, the plaintiff appearing by her attorney N. Paley Phillips, and the defendants appearing by their attorneys John F.

Zimmermann and Shaw, Muskat & Paulsen, and it appearing to the Court from the depositions of the plaintiff Ann Warner and the defendant Leo Lieberman, and from the affidavits of the plaintiff Ann Warner, the defendant Eleanor Lieberman, and Aaron Starobin, that there is no genuine issue as to any material fact, and that defendants are entitled to a judgment as a matter of law, and the Court having rendered its written Opinion on September 12, 1957, and September 16, 1957, it is

Ordered, Adjudged and Decreed, that summary judgment be entered in favor of the defendants and against the plaintiff, dismissing the complaint of the plaintiff and the above entitled action upon the merits, with costs.

Dated, Milwaukee, Wisconsin, this 19th day of September, 1957.

K. P. Grubb
United States District Judge

108 NOTICE OF APPEAL

Notice is hereby given that Ann Warner, the plaintiff above named hereby appears to the United States Court of Appeals for the Seventh Circuit from the order of the Court in its entirety, dated and entered September 19, 1957, granting summary judgment in favor of the defendants and against the plaintiff, and dismissing the complaint of the plaintiff and the above entitled action upon the merits, with costs, and from the judgment in its entirety, entered on the 19th day of September, 1957, dismissing the complaint of the plaintiff and the above entitled action on the merits with costs to the defendants.

Dated September 26, 1957.

N. Paley Phillips
N. Paley Phillips
Attorney for Plaintiff Appellant
212 W. Wisconsin Avenue
Milwaukee, Wisconsin

106 NOTICE OF ENTRY OF JUDGMENT.

Please Take Notice, that on the 19th day of September, 1957, a Judgment was entered in the United States District Court for the Eastern District of Wisconsin, a true and correct copy of which Judgment is attached hereto.

Dated this 19th day of September, 1957.

John F. Zimmermann, and
Shaw, Muskat & Paulsen,
Attorneys for defendants.

107 JUDGMENT.

Pursuant to the Order of the Court entered herein on the 19th day of September, 1957, and upon all the records, files and proceedings herein, and on motion of John F. Zimmermann and Shaw, Muskat & Paulsen, attorneys for the defendants, it is

Adjudged, that the complaint of the plaintiff and the above entitled action be and the same are hereby dismissed on the merits, with costs to the defendants.

Dated, this 19th day of September, 1957.

By the Court,
Dale E. Ihlenfeldt
Clerk

110 CERTIFICATE OF SERVICE.

United States of America
Eastern District of Wisconsin—ss:

I, Dale E. Ihlenfeldt, Clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that the writings annexed to this are the original pleadings, judgment and other papers, in the case of Ann Warner, Plaintiff, *vs.* Leo Lieberman and Eleanor Lieberman, Defendants, Civil Action No. 56-C-237.

In Testimony Whereof, I have hereunto set my hand, and duly affixed the seal of said court at the City of Milwaukee, in said district, this 17th day of October, 1957.

Dale E. Ihlenfeldt
Clerk

(Seal)

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IN THE

Supreme Court of the United States

..... TERM, 1958

No. 996

ANN WARNER,
Petitioner,

vs.

LEO LIEBERMAN and ELEANOR LIEBERMAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In deciding that there was no tryable issue of fact and affirming the decision of the District Court granting defendants-appellees' motion for summary judgment, the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court, and, the Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter of federal law; and said Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.	7
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In The

Supreme Court of the United States

..... Term, 1958

No.

ANN WARNER,
Petitioner,

vs.

LEO LIEBERMAN and ELEANOR LIEBERMAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on March 3, 1958.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit, reported at page 1A is appended hereto as Appendix A. The District Court rendered its opinion in this cause, which is reported at 154 F. Supp. 362.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on March 3, 1958, and the jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Was an issue of fact created by the pleadings, depositions and affidavits in this case so that defendant-appellees' motion for summary judgment should be denied.

RULES INVOLVED

Rule 56, SUMMARY JUDGMENT:

> "(c) Motion and Proceedings Thereon. • • • The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. • • •"

STATEMENT OF THE CASE

The petitioner, plaintiff-appellant, Ann Warner, sued Leo and Eleanor Lieberman, defendants-appellees, for damages occasioned by the alleged negligence of the defendants in the care and maintenance of a chaise longue chair owned by the defendants, and which was on their premises. Defendants-appellees were the hosts, and petitioner was their guest. The defendants-appellees brought a motion for summary judgment and the District Court sustained defendants' motion for summary judgment, and an order and judgment was filed, which judgment provided that the complaint of the plaintiff and the action of said plaintiff were dismissed on the merits, from which an appeal was duly taken to the Circuit Court of Appeals. Error is charged in the granting of the motion for summary judgment, which in considering said motion the District Court had before it the pleadings, various depositions and affidavits.

Petitioner was a gratuitous house guest of the defendants (App. 18, 36).* Petitioner arrived at the home of the defendants on July 1, 1956 from California (App. 17, 36). On July 12, 1956, petitioner sustained the injuries for which she brought this suit (App. 17, 36). Petitioner had been seated for about a minute on the chair portion of a chaise longue chair in the yard of the defendants. The defendant, Leo Lieberman, was grilling steaks. The defendant, Eleanor Lieberman, was in the house (App. 19, 26). The chaise longue chair in question had never previously been used by the petitioner (App. 18, 27, 37). Petitioner had seen it but did not observe anything wrong with it (App. 21, 25, 28, 37). The back of the chair portion of the chaise longue was toward the south and the footstool portion was to the north. Petitioner was facing west with her back toward the home of the defendants.

*References "App. . . . " are to the printed appendix to appellant's brief in the Court of Appeals, which has been certified and filed in this Court.

Petitioner sat on the chaise longue chair for a short period of time and then heard her brother, the defendant, Leo Lieberman, call for her to come and eat. The portion of the chaise longue chair, where one sits, is considerably lower than the average chair, and in order to get up one has to push on the edge of the longue in order to get the body up (App. 19, 25, 37). Petitioner pushed herself up and walked toward the front of the chaise longue, or to the north. She had taken only a step, or two, when she fell. Her right foot became entangled in the leg of the chaise longue which was loose and not fastened, and which apparently was pushed to the west and north in a counter-clockwise manner as she got off the chaise longue (App. 28). As petitioner sat on the chaise longue, she could not notice that the leg was loose (App. 20, 28, 37). The loose leg of the chaise longue chair swiveled in a clockwise direction and pulled away from the seat as she was walking around to the front and caught her right leg, tripping her (App. 29). She fell forward and hit the ground (App. 4, 19). At the time petitioner was seated on the chaise longue its leg was in a normal position (App. 20). In petitioner's affidavit, she sets forth that there was no opportunity to see the defective leg which had swiveled from the front of the chair before she tripped (App. 20, 28).

The affidavit of Aaron Starobin, an attorney in the office of petitioner's attorney, states that he examined the chaise longue on August 20, 1957 at the residence of an agent of the insurance company for defendant; that there were a total of three screws missing from the stool portion of it; that originally the front legs were attached by four screws, two on each side, and that at the time of his examination, thirteen months after the injury, only one screw remained which was on the righthand side; that upon setting oneself

on that portion of the chaise longue known as the stool portion, one would not have knowledge that the longue was unsafe, as the legs had been pushed below it; that upon getting up and pushing the chaise longue to one side in order to assist in getting up, because of the low height of the longue, the metal legs attached to the stool portion of the chaise longue could be seen to swing out from the chair proper in a clockwise fashion and could easily cause one to trip, as one would not expect that (App. 35, 37).

The testimony of the defendant, Leo Lieberman, in his deposition, sets forth that during the winter prior to the accident, the chaise longue had been stored in the basement; that prior to storing it in the basement he had noticed the defective front legs with the bolts missing; that when he took it out in May or early June, the front portion of the leg was not fastened to the footstool portion of the chaise longue (App. 9); that the support should have been fastened to the footstool portion on the left side and the right side (App. 9); that the left front side was not fastened, and that a screw and bolt were missing (App. 9); that the defendant, Leo Lieberman, noticed that it needed fixing but that he had not fixed it (App. 9); that when he took it out in the spring, he again noticed that it was not working and that it required repair (App. 10). That if the defendant, Leo Lieberman, put the support underneath the frame, it would stay there and hold, but that it would not hold solid (App. 10). That if the footstool portion was pushed slightly, the support leg would come loose (App. 10). That the defendant, Leo Lieberman, knew that a person could fall on the leg that was loose and that it would move when a person was either about to sit on it or was in the process of getting up from it (App. 13). That the defendant, Leo Lieberman, knew that the

chaise longue chair, in the condition it was in at the time the petitioner was injured, was dangerous (App. 16). That the defendant never told petitioner that the chaise longue was defective, and that although defendant knew somebody could fall, he did not believe anybody would be badly hurt.

The affidavit of Eleanor Lieberman set forth that she knew there were several screws missing from the chaise longue in the summer of 1956 and prior to the accident. That she and the child of the defendants used the chaise longue during that time with the screws missing, and to the best of her knowledge no one had ever been injured because of the condition of the chaise longue before petitioner's accident (App. 26). That she did not see the leg of the chaise longue protruding beyond the front or side of the chaise longue before the accident, although she did see the leg of the chaise longue protrude after the accident when petitioner was entangled in the chaise longue. (App. 26). That prior to the accident, the defendant, Eleanor Lieberman, had used the chair carefully, being aware of its condition, and that she had never told the petitioner of its dangerous condition (App. 26, 27).

Jurisdiction was originally invoked in the United States District Court for the Eastern District of Wisconsin by virtue of diversity of citizenship. On September 19th, 1957, a judgment was entered in the United States District Court for the Eastern District of Wisconsin dismissing the complaint of the plaintiff and the above entitled action on the merits with costs. An appeal was taken to the Circuit Court of Appeals of the Seventh Circuit and the Circuit Court of Appeals affirmed the findings and judgment of the District Court. The judgment of the Circuit Court of Appeals was entered March 3, 1958.

ARGUMENT.

In deciding that there was no tryable issue of fact and affirming the decision of the District Court granting defendants-appellees' motion for summary judgment, the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court, and, the Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter of federal law; and said Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Issues of negligence are ordinarily not susceptable of summary judgment but should be resolved for trial in the ordinary manner. *Aetna Ins. Co.* v. *Cooper Wells & Co.*, C. A. Mich. 1956, 234 F. 2d 342; 6 Moore's Federal Practice (2d Ed.) 2232, note 4 and cases cited.

Summary judgment, under Rule 56 of the Federal Rules of Civil Procedure, should be temperately and cautiously used lest abuse reap nullification. *Avrick* v. *Rockmont Envelope Co.*, C.C.A. Colo. 1946, 155 F. 2d 568.

The trial court should be slow in granting a motion for summary judgment depriving a party of his right to trial by jury where there is a reasonable indication that a material fact is in dispute. *Begnaud* v. *White*, 6 Cir., 170 F. 2d 323, 327; *Estepp* v. *Norfolk & W. Ry. Co.*, 6 Cir. 192 F. 2d 889, 893; *Associated Press* v. *United States*, 326 U.S. 1, 65 S. Ct. 1416, 89 L. ed. 2013; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S. Ct. 724, 88 L. ed. 967; *Kam Koon Wan* v. *E. E. Black, Limited*, D.C. Hawaii, 1948, 75 F. Supp. 553.

The function of a motion for summary judgment is not to permit the court to decide issues of fact, but solely to determine whether there is an issue of fact to be tried. *Pickle* v. *Trimmel*, D.C., 93 F. Supp. 823; *Ramsouer* v. *Midland Valley R. Co.*, 8 Cir. 135 F. 2d 101, 103; *Pierce* v. *Ford Motor Co.*, 4 Cir., 190 F. 2d 910, 915, 916; *Dulansky* v. *Iowa-Illinois Gas & Electric Co.*, 8 Cir. 191 F. 2d 881, 883; *Toebelman* v. *Missouri, Kansas Pipe Line Co.*, C.C.A. Del. 1942, 130 F. 2d 1016; *American Optical Co.* v. *New Jersey Optical Co.*, D.C. Mass. 1944, 58 F. Supp. 601.

A court must accept plaintiff's fact allegations and statements in their affidavits and only on the assumption of their verity, yet insufficient, may summary judgment be entered against them. Moore's Federal Practice, page 3184; *Sartor* v. *Arkansas Natural Gas*, 321 U.S. 620, 64 S. Ct. 724; *Friedman* v. *Washburn Co.*, 7 Cir., 145 F. 2d 715; *Campana Corp.* v. *Harrison*, 7 Cir., 135 F. 2d 334; *Furton* v. *City of Menasha*, C.C.A. Wis. 1945, 149 F. 2d 945, certiorari denied 66 S. Ct. 170, 326 U.S. 771, 90 L. ed. 466.

In controverting the rationale of the Court of Appeals in supporting the findings and judgment of the District Court, granting defendants-appellees' motion for summary judgment, it is necessary to analyze the substantive law of Wisconsin relative to a guest invited onto the premises of the host for social purposes, the meaning of active and passive negligence in the State of Wisconsin, the meaning of a trap in Wisconsin, and as to whether or not the matter of a trap is an issue of fact or can be determined by the court as a matter of law.

The substantive law of Wisconsin applies to this case.

In the case of *Greenfield* v. *Miller*, 173 Wis. 184; 180 N.W. 834, the general rule is set forth that where a guest is invited to come onto the premises of the host for social

purposes, the relation thus created is one of licensor and licensee, and the rule of ordinary care does not apply. This case further sets forth that there is no liability on the part of the licensor for injury sustained by those coming on his premises as mere licensees, unless there is something on the premises in the nature of a trap, which fact proximately caused the injuries, or the licensor was guilty of active negligence.

In the *Greenfield* case, reference is made to Bigelow Torts (8th Ed.) 160, 161, where it is stated:

> If a licensee is invited only as a guest or friendly visitor, or for benevolence, he enters on no better footing as far as the present question is concerned, than if he were a bare licensee; he can not hold the owner or occupant to any duty of care or diligence beyond giving notice of any danger of which he is aware.

In the case of *O'Shea* v. *Lavoy*, 175 Wis. 456, 185 N.W. 525, the Court in discussing a trap, stated that a trap, within the meaning of this rule as we understand it, is a hidden danger lurking upon the premises which may be avoided if known. Hence, it is the duty of the host to advise his guest of its presence, so that the guest may enjoy the premises in a security equal to that enjoyed by the host.

In Volume 63 C.J., page 803, a trap is defined as a concealed defect or hidden danger lurking upon the premises which may be avoided if known.

A case of interest which defines the meaning of both a trap and what constitutes active negligence is *Brindson* v. *Chicago & N.W. R. Co.*, 144 Wis. 614; 129 N.W. 664, where the plaintiff, a small boy, fell into a steam and hot water pit constructed by the defendant in a breakwater. The court, in commenting, stated that the opening or hole in the cover of the steam pit, as described in the evidence, was dangerous, seemed self-evident from its very nature

and condition. It is also clear that the hole in the planking that covered the excavation was not readily observed, and was obstructed by the steam arising therefrom through this hole and the cracks between the planks covering the pit. This condition of the planks made the pit a dangerous trap or pitfall to persons on the premises, and the omission to observe and repair the planking constitutes active negligence on the part of the railroad toward them.

In the case of *Lehman* v. *Amsterdam Coffee Co.*, 146 Wis. 213; 131 N.W. 362, where the stairway was surrounded on two sides with piles of merchandise as high or higher than the rail and on one side by shelving, the court stated that the evidence seemed to be ample to show that in approaching it from the front of the store there would be no sign or indication of a stairway, and that only as one came practically to the opening itself from the east was it possible to see it, or anything suggesting the existence of an opening in the floor. The jury might, the court stated, well say from the evidence that it was a trap or snare of whose existence under the circumstances the rules of ordinary care would require that an invited person be warned.

The Court of Appeals, in the case at bar, in delving into the question as to whether or not a trap existed, stated that everything occurred in daylight, and that the protruding leg obviously was clearly apparent as petitioner walked toward it and was tripped thereby. The Court of Appeals further stated in its decision that the leg, at the time and just before petitioner tripped over it, was not hidden or lurking and was therefore not a trap.

The Court of Appeals in its decision further placed emphasis on the affidavit of Aaron Starobin, which affidavit in part set forth that the metal legs attached to the stool portion *could be seen* to swing out in a clockwise

fashion and could easily cause one to trip. (Emphasis by Court of Appeals).

Referring to the *Lehman* case, and by way of analogy, as the party in the *Lehman* case came upon said stairway, can it be said that said stairway was less obvious than the leg of the protruding chair in the case at bar, bearing in mind that in the case at bar, when petitioner sat down, the leg of the chaise longue was in normal position? Further, when petitioner got up from said chair, unbeknown to petitioner, the leg swiveled out, and petitioner fell only after she had taken a step or two. In standing up, it is not natural for a person to look at his feet, but to look straight ahead. *Duncan* v. *Grand Rapids*, 121 Wis. 626, 99 N.W. 317; *Smith* v. *Clayton Const. Co.*, 189 Wis. 91, 206 N.W. 67.

The Court of Appeals, in its decision, would imply that the second the leg of the chair swiveled around, it was open and obvious to petitioner. Although this might be the case relative to a person walking towards the chaise longue, it was not the case as to petitioner.

The word "trap" has often been used in cases, but this word is a figure of speech and not a formula, involving the idea of concealment and surprise from an appearance of safety under circumstances cloaking a reality of danger. In *Slade* v. *Battersea & P. Hospital Management Committee* (1955) 1 Week L. R. 207 (1955) 1 All Eng. 429.

It is petitioner's contention that whether or not the condition of the chaise longue chair and the leg of said chair which protruded as a result of the pressure of petitioner, which she exerted upon said chair as she was getting up, was a trap, is an issue of fact, and the Court of Appeals, in arguing that it was not a trap, was deciding an issue of fact, rather than determining whether there was an issue of fact.

In the case of *Jablonski* v. *Bay City*, 248 Mich. 306, 226 N.W. 865, where a pedestrian was tripped by a low sagging wire made virtually invisible by a light snow, the Court stated, the question whether the wire was a proper guard or a dangerous instrumentality would be for the jury.

In *Debes* v. *Morganroth*, 136 A. 2d 896 (N.J. App. Div. 1957) where plaintiff, a social guest, at defendant's cottage, opened a door and fell down a stairway, and plaintiff's evidence showed all doors in the foyer were indiscernible in shape and appearance, it was held that plaintiff's evidence raised a jury question on the host's negligence and the guest's contributory fault.

Two cases of interest relative to the duties of the host relative to the guest, and the meaning of a trap are *Malmquist* v. *Leeds*, 245 Minn. 130; 71 N.W. 2d 865, and *Rushton* v. *Winters*, 331 Pa. 78; 200 A. 60.

Relative to the affidavit of Aaron Starobin, an attorney in the office of petitioner's attorney, and especially in view of the emphasis placed on this affidavit by the Court of Appeals, it can be stated that the said Aaron Starobin examined this chaise longue chair with the express intention to notice what caused the leg to pull out, and, therefore, that was the reason that the metal legs attached to the stool portion could be seen by him to swing out. There is nothing in his affidavit that his body or head was in exactly the same position as that of petitioner's when he observed the leg of the chair to swing out.

Petitioner further urges that the Court of Appeals was in error in its definition of active and passive negligence. The Circuit Court of Appeals refers to the language of 65 C.J.S. 496, and came to the conclusion that although the facts indicate that the defendants in the case at bar were negligent in failing to repair the longue before the acci-

dent, such omission is passive neligence, and is not actionable where the relation of licensor and licensee exists, as in this case.

It is petitioner's contention that active negligence can be more than a positive act, but, it can also mean a failure of duty to act when one has knowledge of a situation involving risk to another. In the case of *Brindson* v. *Chicago & N.W. R. Co.*, 144 Wis. 614; 129 N.W. 664, it is stated that this condition of the planks made the pit a dangerous trap or pitfall to persons on the premises, and the omission to observe and repair the planking constitutes active negligence on the part of the railroad toward them. The fact that active negligence can also constitute an omission to act, is emphasized in *Ward* v. *Avery*, 113 Conn. 394, 155 A. 502, where it is stated that the defendant, knowing of the presence of the plaintiff, who was a mere licensee, was under a duty to use ordinary care to avoid injuring her by a positive act of negligence or a failure of duty, the equivalent of such an act, and it could be reasonably found that failure to give warning of a slippery floor was a breach of this duty.

In Vol. 65 C.J.S., page 322, active and passive negligence are defined as distinguishable from each other. The term, "active negligence" as properly used, denotes some positive act or some failure in a duty of operation which is the equivalent of a positive act, and "passive negligence", the failure to do something that should have been done.

CONCLUSION.

In view of the foregoing, we respectfully submit that the Court of Appeals' opinion below is in conflict with the rules of this Court and other Circuit Courts of Appeals on important questions of Federal Law, and is further in conflict with Federal Rule 56(c) of Federal Rules of Civil Procedure; and that the effect of the decision of the Circuit Court of Appeals is to cause confusion and uncertainty in the law with resulting loss of substantial justice to citizens of the United States, and will increase rather than decrease litigation in United States Courts of Review, unless the supervision and correcting authority of this Court is brought into use by granting the writ of certiorari.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit and that on such review by this Court, the judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or reversed and remanded with appropriate directions.

Respectfully submitted,

N. PALEY PHILLIPS
RICHARD DILLON
Attorneys for Petitioner

Dated: May 12, 1958
BERTRAM J. HOFFMAN
Of Counsel

APPENDIX A

OPINION

IN THE

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 12160

No. 12160 SEPTEMBER TERM, 1957 JANUARY SESSION, 1958.

ANN WARNER,
Plaintiff-Appellant,
v.
LEO LIEBERMAN and ELEANOR LIEBERMAN,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

March 3, 1958

Before FINNEGAN, SCHNACKENBERG and HASTINGS, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Plaintiff, Ann Warner, sued Leo and Eleanor Lieberman, defendants, for damages occasioned by the alleged negligence of the defendants in the care and maintenance of a chaise longue[1] which belonged to defendants, and which was on their premises. Defendants were the hosts and plaintiff was their guest. The district court sustained defendants' motion for summary judgment and entered judgment dismissing the action on the merits,[2] from which this appeal has been taken. Error is charged in the granting of the motion for summary judgment, in considering which the district court had before it the pleadings, various depositions and affidavits.

[1] Herein called "lounge" or "lounge chair".

[2] 154 F. Supp. 362.

Beginning July 1, 1956, plaintiff was a gratuitous house guest of defendants, she being a sister of defendant Leo Lieberman. On July 12, 1956, plaintiff sat on the chair portion of the lounge in the yard of defendants. Defendant Leo was grilling steaks and defendant Eleanor was in the house. The lounge had never previously been used by plaintiff nor had she ever observed anything wrong with it. Leo called for her to come and eat. Plaintiff pushed herself off the lounge and started to walk around the front of it. She had taken only a step or two when she fell. As plaintiff sat on the lounge, she could not notice that a leg was loose. As she pushed the lounge in getting up, she caused the leg to turn in a swivel or clockwise action and pull away from the lounge so that as she was walking around to the front, it caught her right leg and tripped her. At the time plaintiff was seated on the lounge its leg was in a normal position. In plaintiff's affidavit, she sets forth there was no opportunity to see the defective leg which had swiveled from the front of the chair before she tripped.

On August 20, 1957 one of plaintiff's attorneys examined the lounge. It appeared that there were three screws missing from the stool portion; that originally the front legs were attached by four screws, two on each side, and that, at the time of his examination, only one screw remained, which was on the right-hand side; that from a sitting position on the stool when the legs were pushed below it, one would not know that it was unsafe; that, upon standing up and pushing the lounge to one side in order to get up, the metal legs attached to the stool portion *could be seen* to swing out in a clockwise fashion and could easily cause one to trip.

During the winter prior to the accident, the lounge had been stored in the basement; prior to storing Leo had noticed the defective front leg with the bolts missing; when he took it out in May or early June, the front portion of the front leg was not fastened to the footstool portion of the lounge; on the left front side a screw and a bolt were missing; if the stool portion was pushed

slightly, the support leg would come loose; he knew a person could fall on the leg that was loose and that it would move when a person was either about to sit on it or was in the process of getting up from it; he knew that the lounge was dangerous, but he never told plaintiff that fact, and although he knew someone could fall, he did not believe anyone would be badly hurt.

Eleanor knew there were several screws missing from the lounge in the summer of 1956 and prior to the accident. She and the child of defendants used the lounge during that time with the screws missing, and to the best of her knowledge no one had ever been injured because of the condition of the lounge before plaintiff's accident. Eleanor did not see the legs of the lounge protruding beyond the front or side of the lounge before the accident, although she did see the legs protruding after the accident. Prior to the accident, Eleanor had used the chair carefully.

Do these facts, considered in a light most favorable to plaintiff, establish actionable negligence on the part of defendants?

The substantive law of Wisconsin applies to this case.

The general rule is that where a guest is invited to come into the premises of the host for social purposes, the relation thus created is one of licensor and licensee and the rule of ordinary care does not apply. *Greenfield* v. *Miller*, 173 Wis. 184, 180 N.W. 834. Where the relation of licensor and licensee exists, a licensee can recover only for the setting of a trap by, or for active negligence of, the licensor, *ibid.* 190.

In *Leuko* v. *Chas. A. Krause Milling Co.*, 179 Wis. 83, 190 N.W. 924, it was held that a mere licensee on private property takes the premises as he finds them and that the owner owes him no duty save to refrain from active negligence rendering the premises dangerous. Active negligence includes the maintenance of a hidden trap, as in *Meyer* v. *Menominee & M. L. & T. Co.*, 151 Wis. 279, 138 N.W. 1008, a pitfall as in *Brinilson* v. *Chicago & N.W. R.*

Co., 144 Wis. 614, 129 N.W. 664, or a partly concealed, open and unprotected straiway to a lower level, near a point at which an elderly customer was invited to go when she came into defendant's hardware store, as in *Lehman* v. *Amsterdam Coffee Co.*, 146 Wis. 213, 131 N.W. 362.

The licensor does owe to a licensee a duty to refrain from acts of active negligence rendering the use of the premises dangerous to the use of licensee. *Masek* v. *Bubenheimer*, 229 Wis. 194, 281 N.W. 924. In the *Masek* case it appeared that defendant drove a pipe with sharp rough edges into the ground, so that its top was only eight inches above the ground and quite incapable of being seen in the nighttime, without notifying plaintiff or her husband, who were tenants in plaintiff's building on said premises, and plaintiff was injured when she struck her foot against the pipe in the dark. The court held that whether the defendant was guilty of active negligence was for the court to determine under all of the circumstances.

We must not lose sight of the distinction between active negligence and passive negligence. Therefore, the language of 65 C.J.S. 496 is in point:

> "* * It follows that, as a general rule, the owner or person in charge of property is not liable, as for negligence, for injuries to licensees due to mere defects or dangers in the condition of the property or premises, or, as it has been expressed, due to passive negligence or acts of omission."

Undoubtedly the facts indicate that defendants were negligent in failing to repair the lounge before the accident. Such omission is passive negligence, which is not actionable where the relation of licensor and licensee exists, as in this case. In such a situation a licensee cannot recover for injuries sustained as the result of the licensor's failure to exercise ordinary care, *supra* 3.

Plaintiff in this court defines a trap as "a hidden danger lurking upon the premises which may be avoided if known." If we accept this definition and apply it to the occurrence which resulted in plaintiff's injury, we find

that, having arisen from the lounge, plaintiff was walking around to the front of it when she fell because her foot became entangled in a loose leg of the lounge which was pushed to the west and north as she got off the lounge. This all occurred in daylight. The protruding leg obviously was clearly apparent as she walked toward it and was tripped over it, was not hidden or lurking and was, therefore, not a trap. Had she been injured by a collapse of the lounge while she sat on it, a different question would have been presented.

We hold that the facts, under Wisconsin law, support the finding and judgment of the district court. There will be an affirmance here.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

JUDGMENT

United States Court of Appeals
for the Seventh Circuit

Pursuant to the Order of the Court entered herein on the 19th day of September, 1957, and upon all the records, files and proceedings herein, and on motion of John F. Zimmermann and Shaw, Muskat & Paulsen, attorneys for the defendants, it is

Adjudged, that the complaint of the plaintiff and the above entitled action be and the same are hereby dismissed on the merits, with costs to the defendants.

Dated, this 19th day of September, 1957.

By the Court,
Dale E. Ihlenfeldt
Clerk

APPENDIX C

OPINION OF UNITED STATE DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

(Not Printed)

Pursuant to Rule 23 (i) we have not printed the Opinion of the United States District Court, Eastern District of Wisconsin, since we have submitted nine copies of the Record, and the Opinion is printed at pages 36 to 45, inclusive, of the Record.

LIBRARY
SUPREME COURT, U. S.

MAY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 996

ANN WARNER,

Petitioner,

vs.

LEO LIEBERMAN and ELEANOR LIEBERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JOHN F. ZIMMERMANN,
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773 North Broadway,
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HAMILTON-ACKERMEYER CO.
MILWAUKEE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 996

ANN WARNER,

Petitioner,

vs.

LEO LIEBERMAN and ELEANOR LIEBERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

On the undisputed facts in the record, are the respondents entitled to judgment as a matter of law?

STATEMENT OF THE CASE

For the purposes of this argument, respondents do not controvert the statement of the case set forth in petitioner's petition.

ARGUMENT

I.

On the Undisputed Facts in the Record, the Respondents Are Entitled to Judgment As a Matter of Law.

(a) Summary judgment may be granted in a negligence action.

Petitioner erroneously argues that summary judgment under the Federal Rules of Civil Procedure may not be granted in a negligence action. The complete answer to this contention is that there is no language in Rule 56 of those rules which so limits its application. Rule 56 provides in material part as follows:

> "(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
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> "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Furthermore summary judgments have been uniformly allowed in the following negligence actions where there was, as here, no issue of fact to be determined: *Zampos v. United States Smelting Refining and Min. Co.*, 206 F. 2d 171 (CA 10th Cir); *Surkin v. Charteris*, 197 F. 2d 77 (CA 5th Cir); *American Airlines v. Ulen*, 186 F. 2d 529 (CA DC Cir); *Thomas v. Furness (Pacific) Limited*, 171 F. 2d 434 (CA 9th Cir), certiorari denied, 337 U S 960, 93 L ed 1759; *Heagney v. Brooklyn Eastern Dist. Terminal*, 190 F. 2d 976 (CA 2nd Cir), certiorari denied, 342 U S 920, 96 L ed 688; *Wendelen v. Commander Larabee Milling Company*, 187 F. 2d 732 (CA 2nd Cir); *Archer v. United States*, 217 F. 2d 548 (CA 9th Cir), certiorari denied, 348 U S 953, 99 L ed 745; *Wilkinson v. Powell*, 149 F. 2d 335 (CA 5th Cir); *Polly Chin Sugai v. General Motors Corporation*, 137 F. Supp. 696 (Idaho S.D.). See also Moore's Federal Practice 2nd Edition Vol. 6, Sec. 56.17 (42), p. 2232 and cases cited thereunder.

There is no issue as to facts here nor was there in the Court of Appeals or District Court. Respondents for the purposes of this argument do not controvert the statement of the case set forth in petitioner's petition. Based upon the undisputed facts considered in a light most favorable to petitioner, the learned Court of Appeals and District Court held as a matter of law actionable negligence was not established on the part of respondents. The Court of Appeals said (Petitioner's Appendix 3A):

> "The substantive law of Wisconsin applies to this case.
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> "The general rule is that where a guest is invited to come into the premises of the host for social purposes, the relation thus created is one of licensor and licensee and the rule of ordinary care does not apply. *Greenfield v. Miller*, 173 Wis. 184, 180 N.W. 834. Where the relation of licensor and licensee exists,

a licensee can recover only for the setting of a trap by, or for active negligence of, the licensor, *ibid.* 190.

"In *Leacko v. Chas. A. Krause Milling Co.*, 179 Wis. 83, 190 N.W. 924, it was held that a mere licensee on private property takes the premises as he finds them and that the owner owes him no duty save to refrain from active negligence rendering the premises dangerous. Active negligence includes the maintenance of a hidden trap, as in *Meyer v. Menominee & M. L. & T. Co.*, 151 Wis. 279, 138 N.W. 1008, a pitfall as in *Brinilson v. Chicago & N. W. R. Co.* 144 Wis. 614, 129 N.W. 664, or a partly concealed, open and unprotected stairway to a lower level, near a point at which an elderly customer was invited to go when she came into defendant's hardware store, as in *Lehman v. Amsterdam Coffee Co.*, 146 Wis. 213, 131 N.W. 362.

"The licensor does owe to a licensee a duty to refrain from acts of active negligence rendering the use of the premises dangerous to the use of licensee. *Masek v. Bubenheimer*, 229 Wis. 194, 281 N.W. 924. In the *Masek* case it appeared that defendant drove a pipe with sharp rough edges into the ground, so that its top was only eight inches above the ground and quite incapable of being seen in the nighttime, without notifying plaintiff or her husband, who were tenants in plaintiff's building on said premises, and plaintiff was injured when she struck her foot against the pipe in the dark. The court held that whether the defendant was guilty of active negligence was for the court to determine under all of the circumstances.

"We must not lose sight of the distinction between active negligence and passive negligence. Therefore, the language of 65 C.J.S. 496 is in point:

> "'* * * It follows that, as a general rule, the owner or person in charge of property is not liable, as for negligence, for injuries to licensees

due to mere defects or dangers in the condition of the property or premises, or, as it has been expressed, due to passive negligence or acts of omission.'

"Undoubtedly the facts indicate that defendants were negligent in failing to repair the lounge before the accident. Such omission is passive negligence, which is not actionable where the relation of licensor and licensee exists, as in this case. In such a situation a licensee cannot recover for injuries sustained as the result of the licensor's failure to exercise ordinary care, *supra* 3.

"Plaintiff in this court defines a trap as 'a hidden danger lurking upon the premises which may be avoided if known.' If we accept this definition and apply it to the occurrence which resulted in plaintiff's injury, we find that, having arisen from the lounge, plaintiff was walking around to the front of it when she fell because her foot became entangled in a loose leg of the lounge which was pushed to the west and north as she got off the lounge. This all occurred in daylight. The protruding leg obviously was clearly apparent as she walked toward it and was tripped thereby. The leg, at the time and just before she tripped over it, was not hidden or lurking and was, therefore, not a trap. Had she been injured by a collapse of the lounge while she sat on it, a different question would have been presented.

"We hold that the facts, under Wisconsin law, support the finding and judgment of the district court."

(b) The Court of Appeals Correctly Held That the Chaise Lounge Over Which Petitioner Tripped Was Not a Trap as Defined by Wisconsin Law and Respondents Were Not Guilty of Active Negligence in Failing to Replace the Missing Screws in the Chaise Lounge.

Petitioner's argument that a trap is an issue of fact for the jury is completely answered by the above opinion of the Court of Appeals wherein it cites Wisconsin cases which have defined a trap to be a hidden or concealed danger, not an open and obvious condition on the landowner's premises as existed here. In *Lewko v. Chas. A. Krause Milling Co.*, 179 Wis. 83, 190 N.W. 924, the court said (page 86):

> "Where this court has held a defendant liable for a dangerous condition of premises as to licensees or trespassers it has been in cases such as Kelly v. Southern Wis. R. Co. 152 Wis. 328, 140 N.W. 60, and Ptak v. Kuetemeyer, 177 Wis. 262, 187 N.W. 1000, where the dangers were in public streets where children had a right to be; or in cases where the danger constituted a hidden death trap as did the electric wires in Meyer v. Menominee & M. L. & T. Co. 151 Wis. 279, 138 N.W. 1008, or an obscured pitfall in a licensed pathway as in Brinilson v. C. & N. W. R. Co. 144 Wis. 614, 129 N.W. 664, which was held to constitute active negligence.
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> "Useful and not grossly negligent conditions and appliances on private property do not render the owner thereof liable to mere licensees or trespassers. To do so they must be of such a character as to constitute active negligence. The pit in question was open, obvious, and useful, and though dangerous to children, and perhaps to adults also, it cannot be classed as a hidden trap or a concealed death-dealing instrumentality."

The above language applies to the chaise lounge here involved which respondents and their child used for two

years in the condition it was at the time of the accident. Petitioner's accident occurred when she was on her feet and starting to walk. There is no contention here that the chaise lounge was concealed by lack of light, as the accident occurred during the daytime between 5:30 and 6:00 o'clock p.m. during July, 1956. (R 45)

Petitioner cites the cases of *Brinilson v. Chicago & N. W. R. Co.*, 144 Wis. 614, 129 N.W. 664 and *Ward v. Avery*, 113 Conn. 394, 155 A. 502 and contends that active negligence can mean a failure to act. Those cases can be distinguished upon their facts. The *Brinilson Case* involved a small boy who fell into a steam and hot water pit, inadequately covered by planks, below a walk used by the public, which was obviously a pitfall or a hidden trap. The *Ward Case* does not apply because it involved the duty of exercising ordinary care toward an invitee, while the instant action involves a licensee to whom such duty is not owed under Wisconsin law, *Greenfield v. Miller*, 173 Wis. 184, 180 N.W. 834. Active negligence has been defined as relating to activities conducted on premises, whereas passive negligence denotes negligence which permits defects or causes dangers upon property. *Wolfson v. Chelist*, 278 S.W. 2d 39, 47 (Mo. 1955); *Potter Title & Trust Co. v. Young*, 80 A 2d 76, 78 (Pa. 1951). While the failure to have a piece of outdoor furniture in perfect repair may be evidence of lack of ordinary care, it certainly is not the setting of a trap or active negligence as those terms have been defined under Wisconsin law and which is set forth in the above opinion of the Court of Appeals.

The remaining cases cited by counsel for petitioner can also be readily distinguished on their facts. A reading of each of those cases shows they all involved a hid-

den or concealed trap. In *Jablonski v. Bay City*, 248 Mich. 306, 226 N.W. 865, a pedestrian tripped over a low wire which ran along a city sidewalk which was practically invisible because of a light fall of snow. *Debes v. Morganroth*, 136 A. 2d 896 (N.J. App. Div.) involved a house guest falling down a cellar stairway where the door opened over the cellar steps and the doors in the foyer leading both to the bedroom, where the guest was attempting to go, and the cellar stairway were indiscernible in shape and appearance. Petitioner's counsel also cites *Malmquist v. Leeds*, 245 Minn. 130, 71 N.W. 2d 865 and *Rushton v. Winters*, 331 Pa. 78, 200 A. 60. It will be noted in the record that the District Court attached an ADDENDUM dated September 16, 1957 to its opinion granting summary judgment to respondents which considered and distinguished these cases as follows:

> "Since the foregoing opinion was transcribed, plaintiff's counsel in a letter of September 11, 1957, has cited the case of *Rushton v. Winters*, 200 A. 60 (Pa.), and in a letter of September 13, 1957, the case of *Malmquist v. Leeds*, 71 N.W. 2d 863 (Minn.). As before pointed out, this matter must be determined under the law of Wisconsin, and the law of other jurisdictions is not in point. Nevertheless, in the *Rushton* case, where there was a defective, unsafe railing, nine feet above a concrete driveway, it should have been apparent that an unreasonable risk of harm was involved; that the condition could be classified as a trap. It is in no way comparable to the situation here involved.
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> "In the *Malmquist* case, there was an excavation which was obviously very dangerous. By its very nature it constituted a serious risk to any visitor who attempted to use the back entrance. The defendants realized the danger involved. Again, the situation

was not, in the opinion of the court, comparable to the present problem." (R 102)

The District Court also made this observation which applies to some of the cases cited above by petitioner's counsel:

> "In some jurisdictions the test is laid down as to whether the host realizes that the condition involves an unreasonable risk to the guest. While that is not the rule in Wisconsin, and even if it were, one would be loathe to hold that a jury could find that a condition of a chair which had been satisfactory to the family of the owner for two years and on which no one had previously been hurt or had any trouble created an unreasonable risk to the guest." (R 102)

On the other hand, the learned District Court cited a number of cases involving a licensee tripping over an object on the landowner's premises which the court held was neither a trap nor active negligence. These cases are: A guest tripping over defective weather stripping on the doorsill, *Roth v. Prudential Life Ins. Co. of New York*, 42 N.Y.S. 2d 592; a child falling over a wooden stake left in the ground a month after it was used by the landowner, *Passer v. Schimmel*, 158 N.Y.S. 2d 694; a guest being injured when a crudely constructed loose stone in a walk rolled loose while the guest stepped on it, causing him to fall, *Wilder v. Ayers*, 156 N.Y.S. 2d 85; a guest being injured because of broken concrete in the passageway owned by the defendant, *Comeau v. Comeau*, 189 N.E. 588, 92 A.L.R. 1002; a guest catching the heel of her shoe in a broken register, *Colvert v. Ricker*, 49 N.E. 2d 459, 147 A.L.R. 647. (R 100)

CONCLUSION

There are no disputed facts before the Court, and on the basis of the aforementioned authorities where the issue before the Court was thoroughly presented, respondents are entitled, as a matter of law, to dismissal of the petitioner's action against them. As was said in *Christianson v. Gaines*, 174 F. 2d 534, 536:

> "'The principle seems to be that if, under the facts developed, the court at a trial would be required to direct a verdict for the moving party, then a summary judgment should be entered.' Miller v. Hoffman, D.C., 1 F.R.D. 290, 292."

There are no unique or cogent reasons for review of this case by this Court. There is no conflict among the Courts of Appeals or question of public policy involved. As petitioner admits, the substantive law of Wisconsin governs this case and the decision of the Court of Appeals correctly applies that law.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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